No. 82-450

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IN THE

Supreme Court of the United States

LARRY P. CRAMER,

Petitioner,

vs.

TYRONE C. FAHNER, Attorney General of the State of Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

United States Court of Appeals

For the Seventh Circuit

Larry P. Cramer, Petitioner
Fairview Farm
Sidell, Illinois 61876
Petitioner.

In The
SUPREME COURT OF THE UNITED STATES

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LARRY P. CRAMER,
Petitioner,

vs.

TYRONE C. FAHNER,
Attorney General
of Illinois,
Respondent.

- - - - - - - -

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Larry P. Cramer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered June 30, 1982, rehearing denied August 13, 1982.

QUESTIONS PRESENTED

1. Whether the petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to represent the State's evidence.

2. Whether the petitioner was denied due process of law and his rights under the Sixth Amendment where the indictment allowed the petitioner to be convicted upon the basis of facts never presented to the grand jury and thus not part of the crime charged.

3. Whether the petitioner's right to confrontation was abridged where the State concealed the address of a key witness who testified under an alias.

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Williams v. North Carolina, 317 U.S. 287 (1942).

Yates v. United States, 354 U.S. 298 (1957).

Statutes

Ill. Rev. Stat., Ch. 38, sec. 8-1.

Constitutional provisions

Constitution of the United States, Amendments VI, XIV.

REPORTS OF THE CASE IN THE LOWER COURTS

This case was decided on direct appeal in People v. Cramer, 64 Ill.App.3d 688, 381 N.E.2d 827 (1978). The district court issued a written opinion in case number 79-2258, United States District Court for the Central District of Illinois, upon the petitioner's application for a writ of habeas corpus. The opinion of the United States Court of Appeals for the Seventh Circuit is in case numbers 80-2545 and 80-2757, but has not been officially published yet. All these opinions are included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1982. A timely petition for rehearing was denied without opinion on August 13, 1982.

Certiorari is sought on the basis of 28 U.S.C. 1254.

STATUTORY PROVISIONS INVOLVED

Ill. Rev. Stat., Ch. 38, § 8-1:

> Solicitation
> (a) Elements of the offense.
> A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense.

Constitution of the United States, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . ..

Constitution of the United States, Amendment XIV

> . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was indicted December 13, 1974, in Champaign County, Illinois, on six general counts of solicitation and four counts of conspiracy to murder his wife.

He was sentenced to concurrent terms of from one to three years on each charge.

The conspiracy conviction was set aside for reasons unrelated to this petition, when the federal district court below granted a writ of habeas corpus as to the conspiracy charge, which was unanimously affirmed by the Court of Appeals upon a review sought by the State.

The solicitation counts alleged the statutory language and pleaded no facts. The petitioner argued that the indictment should have set forth the words used to solicit and that its vagueness left open the possibility that he was convicted on the basis of facts presented at trial but which were never before the grand jury and no part of the charge.

On direct review, this issue was presented and argued but totally avoided by the state reviewing court opinion. Both the district court and the Court of Appeals decided that the indictment did not need to set forth the words used to solicit, but both courts failed to address the heart of the issue - whether the petitioner could have been convicted on the basis of facts never presented to the grand jury.

The State's evidence at trial consisted primarily of four tape recordings of conversations between the petitioner and a co-conspirator accomplice, together with the testimony of that accomplice, with some corroboration from a one-night girlfriend of the accomplice. The defense consisted of the testimony of the alleged victim, the petitioner's wife, who supplied an alibi as to some events and who testified as to the harmonious marital relationship.

Some two hours into their deliberations on April 15, 1975, the jury requested an Illinois road map and a transcript of these tapes. Without notifying or consulting counsel, the court replied to the jury that these items were not in evidence. The jury then requested the tapes and a recorder. After then discussing the matter with the attorneys, the court denied this request.

Deliberations resumed, no more requests were made, but some twenty hours later, the trial court, on its own initiative, summoned the jury to the courtroom, ascertained that they <u>were</u> making progress, then without reference to the jury request the day before, asked: "Would it help, in your opinion, in this case, if you were to hear the tapes played here in the courtroom?" Upon receiving an affirmative response from the jury, the court directed the replay of the tapes and compelled the petitioner to be present. Forty-five minutes later, verdicts of guilty as to both solicitation and conspiracy were returned.

State and federal cases were cited regarding the constitutional infirmity of the procedure utilized in regard to the tapes. The Appellate Court of Illinois found this error, but a majority of the panel were of the opinion that it was harmless because of the "overwhelming" proof of guilt, although the opinion was authored by the dissenting judge.

The district court, on habeas corpus, said that it was a "close question" whether due process was violated by the state trial judge's action, but that although ". . .viewed with grave concern, this court cannot conlude that those actions were a totally unsolicited intrusion . . .."

The majority opinion of the Court of Appeals said that the petitioner had not carried the burden of showing the replaying of the tapes by the trial judge " . . . so confused the jury or intruded on its function as to deny petitioner due process . . .." A dissenting opinion found that the replaying of the tapes was unrelated to the jury's request, could have resulted in the overemphasis on the probative value of the tapes, and could have been construed by the jury as an indication the trial judge wanted them to return a verdict of guilty.

The third issue, concerning the right to confrontation, arose after trial but before sentencing, when counsel for the petitioner learned that a key witness for the prosecution had testified

under an alias, was involved in narcotics use and traffic at the time of her testimony and was impeachable on a variety of matters. The State had not furnished her address despite two court orders to do so, and the State admittedly knew of her narcotics activity.

The trial court denied a new trial, basing his decision not upon the Constitution but upon State discovery rules, although he made a finding that the State should have furnished her address.

In the Appellate Court, the petitioner argued both a violation of Brady and the right to confrontation, but that court did not address the issue.

On habeas corpus, both the district court and the Court of Appeals determined that this evidence would not have changed the outcome of the trial, and was not, therefore, "material" under the Agurs standard, but both courts failed to address the matter of right to confrontation, which was the only aspect of this issue which was even raised in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to re-present the State's evidence.

It may first be noted that federal due process is violated in state criminal proceedings where the trial is unfair by virtue of interferece with the jury, whether the interference comes from a third party, Turner v. Louisiana, 379 U.S. 466 (1965); Parker v. Gladden, 385 U.S. 363 (1966), or from the trial court itself, Jenkins v. United States, 380 U.S. 445 (1965).

Where a trial court has made unwarranted inquiries of the jury, implied that the jury had to decide the case, implied an opinion, summarized the issues without mentioning the defendant's defense, given the dynamite charge improperly, coercion has been found. United States v. Seawall, 550 F.2d 1159 (1977); United States v. Harris, 391 F.2d 348 (6th Cir. 1968), cert. denied 393 U.S. 874; United States v. Williams, 447 F.2d 894 (5th Cir. 1971); United States v. Contreras, 463 F.2d 773 (9th Cir. 1972); United States v. Diamond, 430 F.2d 688 (1970); United States v. Flannery, 451 F.2d 7[illegible] (9th Cir. 1971); United States v. Smith, 399 F.2d 896 (6th Cir. 1968); United States v. Brandt, 196 F.2d 653 (2d Cir. 1952); United States v. Porter, 396 F.2d 270 (6th Cir. 1967).

The replaying of the tape recordings - the sine qua non of the State's case - catapaulted a speedy verdict 45 minutes later.

The trial court asked the jury if it would "help" if they heard the tapes. Rehearing any portion of the trial may have been "help" to the jury. If the court had asked it it would help to have the testimony of the petitioner's wife read to them, the court would have been emphasizing the evidence most helpful to the petitioner and could have led the jury to believe that the court felt the petitioner was innocent. But the court singled out the piece of evidence most helpful to the State, and he did not do it in the context of nor with any reference to the jury's request twenty hours before. What the court did suggested that the court favored a guilty verdict, that the jury should hurry up and decide, and that the tapes were the important part of the case, as was noted in the dissenting opinion in the Court of Appeals.

It is difficult to re-create on paper the drama of that moment when the trial judge staged a re-creation of the crime, as it were, by bringing the jury into an empty courtroom and blaring those tapes over amplifiers. There sat the petitioner and his counsel over their objections, right in front of the jury for scrutinization during the long pauses and delays and periods of silence on the tapes. It would

not be unreasonable to suggest that every fiber of thought from that moment on was concentrated on material on those tapes, and all other evidence in the trial was ignored.

The Court of Appeals majority seized upon the fact that the jury had requested the tapes the day before, shortly after deliberations began. But the trial court in no way indicated he was responding to that request which he had denied, when he inquired as to progress and then he broached the subject of the tapes.

Moreover, if the jury had been given the tapes early in the deliberations, they would have been considered with the testimony, exhibits, instructions, and arguments in the case. But here the jury had had more than twenty hours to consider and discuss those matters. With the trial judge's intervention after the passage of so much time, he focussed the jury's entire attention to the tapes. They became the crux of the deliberations. Further, the judge invested a certain judicial sanctity to the tapes - the court was going to have them played; they would be played in the courtroom. Too, the judge foisted the entire tape evidence on the jury, even though the jury initially may have wanted the transcripts only to find the answer to a single question, or the question giving rise to the initial request might have long before been resolved.

The Court of Appeals majority opined that the fact that the jury was making progess at the time of the trial judge's intervention meant that they were perhaps on the verge of a guilty verdict anyway. That is a totally unwarranted assumption. The record does not reflect how the jury was divided at the time of the judge's intervention. Every trial lawyer has at some time had a case where a jury has flip-flopped from one side to another in a brief time. Illustrative of this is People ex rel. Tobe v. Bensinger, 492 F.2d 232 (7th Cir. 1974), where a jury moved from nine for acquittal to unanimous for guilty after interference by the court.

What the trial judge did in the instant case was so explosive, that it could well have affected the jury in the same fashion as in Tobe.

The length of deliberations themselves point to the fact that this was a case with divided opinions in the minds of the jurors. This court considered a 26-hour deliberation as " . . . indicating a difference among them as to guilt(,)" Parker v. Gladden, 385 U.S. 363 (1966). It was on the delicate balance of this jury, that the trial judge imposed his will, with a surprising interjection: Do you want to hear the tapes again?

Had the jury deliberated another thirty hours after this, it could be argued that the trial judge's conduct had no substantial impact, but the quick verdict minutes later demonstrates the impact.

See United States v. Harris, supra; United States v. Rogers, 289 F.2d 433 (4th Cir. 1961); United States v. Williams, supra.

The Court of Appeals likened this case to the giving of an Allen charge. They then relied upon their own case of United States v. DeStefano, 476 F.2d 324 (7th Cir. 1973), which held that giving an Allen instruction to a non-deadlocked jury was not coercive. The Ninth Circuit has ruled just the opposite. United States v. Contreras, 463 F.2d 773 (9th Cir. 1972).

However, the important difference between this case and cases involving the dynamite charge, regardless of the contrary opinions in the different circuits, is that here the jurors were, in effect, told to re-examine their opinions in light of the tapes, not in light of the views of other jurors.

Certiorari is compelling in this case because it involves at once a universal area of dispute - interchange between court and jury during deliberations - and a unique fact situation. As the Appellate Court opinion noted, no case could be found where the trial judge proffered a review of evidence for the jury. Secondly, there is a conflict between the circuits as pointed out which should be resolved. Further, although this is a state court case, this court by deciding this issue could also give supervisory guidance to the district courts in the area of judge-jury communications during deliberations,

so that nothing as unconscionable as here occurred would likely recur in future cases.

II. The petitioner was denied due process of law and his rights under the Sixth Amendment where the indictment allowed the petitioner to be convicted upon the basis of facts never presented to the grand jury and thus not part of the crime charged.

The Illinois solicitation statute says:

> A person commits solicitation when with intent that an offense be committed, he commands, encourages, or requests another to commit that offense. Ill. Rev. Stat., Ch. 38, sec. 8-1.

Counts IV through IX of the indictment alleged the statutory language, naming Judy Cramer as the victim, murder as the offense solicited sometime between February of 1974 and December 13, 1974, and Charles O. Weathington as the person encouraged or requested. The counts were worded slightly different but did not set out separate incidents or identify the conversations.

Although the scope of federal review of a state court indictment is limited, it may appropriately be reviewed where it is so defective as to deprive the court of juriscition, Dalton v. Hunter, 174 F.2d 633 (10th Cir. 1949), cert. denied, 338 U.S. 906 (1949); Birtch v. Hunter, 158 F.2d

134 (10th Cir. 1946), cert. denied, 331 U.S.825, or plainly does not charge a crime, In re Cardwell, 256 F.2d 576 (9th Cir. 1958); Dawes v. Gough, 170 F.2d 396 (5th Cir. 1948), or is too vague even though in the statutory language. Choung v. California, 320 F. Supp. 625 (1970).

Although this issue was raised on direct appeal, the state court did not address the issue in its opinion, People v. Cramer, 64 Ill.App.3d 688, 381 N.E.2d 827 (1978), thus the rationale for limiting review, namely because it is reviewable on direct appeal, is not applicable. Mitchell v. Hunter, 152 F.2d 959 (10th Cir. 1946), cert. denied, 328 U.S. 860 (1946); Sykes v. Sanford, 150 F.2d 205 (5th Cir. 1945), cert. denied, 326 U.S. 783 (1946).

The cases limiting review of state court indictments on federal habeas corpus are inapplicable here in any event, because it is not the indictment per se that abridges the Constitution, but its vagueness in light of the fact that the trial encompassed many facts which were never before the grand jury. The petitioner has repeatedly raised this issue, but the State has never replied to it, and neither the district court nor the Court of Appeals addressed it.

Comparing the grand jury transcript of the accomplice witness Weathington's testimony (State R. C85-C141) with his trial testimony (State R.

594-1151), reveals that his trial testimony covered many events and alleged conversations with the petitioner over a period of ten months which were never made known to the grand jury, and which, thus, could not have been intended as the charge in the indictment.

Examples of trial testimony concerning alleged conversations between the petitioner and the accomplice which were never presented to the grand jury include: (1) a conversation concerning the use of Weathington's dog to attack Mrs. Cramer (State R. 608-10); (2) a discussion involving Weathington's hiding in Mrs. Cramer's car when she returned home from bowling (State R. 614-15); (3) a conversation concerning a home burglary-murder (State R. 616-17); (4) a conversation in the public defender's office when Weathington was urging the petitioner to "hurry up" (State R. 620-21); a conversation in Weathington's car when he was given twenty dollars by the petitioner (State R. 622); and (6) a conversation July 24, 1974, in which plans were discussed to go search out a possible murder site (State R. 624-26). None of the preceding conversations could have served as the basis for the indictment, since they were not presented to the grand jury. But any one of them could have been used by the trial jury to convict the petitioner.

The petit jury was given carte blanche to look anywhere for solicitation, with no instructions or guidance by the court in what to look at to determine if solicitation occurred. The real possibility exists then that the grand jury could have considered the petitioner's words in conversation "a" to have constituted solicitation; the prosecution could have proceeded on the theory that other words of the petitioner in conversation "b" were the solicitation; the petit jury could have convicted on the basis that words of the petitioner in conversation "c" constituted solicitation; and the trial court could have upheld the verdict in ruling on the post trial motion on the basis of conversation "d".

The averments necessary for a constitutionally valid indictment include a description of the charges sufficient to ensure the defendant "that he is being prosecuted on the basis of facts presented to the grand jury . . ." United States v. Cecil, 608 F.2d 1294 (9th Cir. 1979); United States v. Bohonus, 628 F.2d 1167 (9th Cir. 1980). This court likewise noted that a defendant should not be " . . . convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." Russell v. United States, 369 U.S. 749 (1962). See also Presnell v. Georgia, 439 U.S. 14 (1978); Stirone v. United States, 361 U.S. 212 (1960).

It is impossible to tell from the verdict whether the jury convicted of statements envisioned by the grand jury indictment, statements that would legally constitute solicitation if proved, or legally insufficient statements. This was the fault of the vague and ambiguous indictment which informed neither the petitioner nor the jury "of the nature and cause of the accusation . . .." Constitution of the United States, Amend. VI.

Since it is impossible to tell whether the trial jury relied upon a legitimate or an illegitimate basis for their verdict, the Stromberg doctrine requires the invlidation of the conviction. Stromberg v. California, 283 U.S. 359 (1931); Yates v. United States, 354 U.S. 298 (1957); Street v. New York, 394 U.S. 576 (1968); Cramer v. United States, 325 U.S. 1 (1945); Williams v. North Carolina, 317 U.S. 698 (1970). The court cannot presume a conviction to be based upon a valid ground. Williams, supra.

In the words of Mr. Justice Black:

> It is as much a violation of due process to send an accused to prison following confiction of a charge on which he was never tried as it would be to convict him upon a charge that was never made . . .." Cole v. Arkansas, 333 U.S. 196 (1948).

Not only was there a denial of due process in a very basic way at trial, and a denial of appellate review, but to the extent that the Court of

Appeals' silence on this issue can be interpreted as contrary to the petitioner's position, it is in conflict with decisions of this court and of the Ninth Circuit cases cited, making certiorari desirable.

III. The petitioner's right to confrontation was abridged where the State concealed the address of a key witness who testified under an alias.

The State's second most important witness, "Patty Cozad," was used by the State to corroborate accomplice witness Weathington's account of traveling to Chicago, there making several trips to the Palmer House, buying a knife, taking a gun, in September of 1974, all part of a plan to slay Mrs. Cramer. Cozad did not testify, however, that she was an eyewitness to any solicitation.

Yet, her testimony was especially crucial, since Weathington desperately needed someone to lend an air of credibility to his testimony, in light of his impeachment - three pending felony charges, conviction of other crimes, inconsistent statements, a judicial admission of perjury, and his not having been charged as a co-conspirator in the instant case. Her testimony was also important because it dealt with the only instance in this ten-month saga where Mrs. Cramer may have been in any peril.

Cozad's background came to light when she was arrested following the petitioner's trial. Her real name was Patlynn Stafford. Prior to trial the State never furnished the petitioner with her address despite two court orders to do so, yet they interviewed her on four occasions.

Although not critical to this issue, she did have an impeachable background which the State knew about and discussed with her, including: she was an extensive user of narcotics and hallucinogenic drugs, had been for four years, and used drugs from time to time during the period of her trial testimony; at the time of her testimony she had pending in the same court under the Stafford name a felony charge of possession of a controlled substance; and three weeks before the petitioner's trial she sold narcotics in the same county to an Illinois Bureau of Investigation agent, under the surveillance of the State's chief investigator in this case, although she was neither charged nor arrested for that sale until several months after the petitioner's trial.

She was foisted upon the jury as an ordinary citizen without motive to fabricate.

The petitioner here contends that the State's concealment of Cozad's real name and her address, taken together with the concealed items relative

to her impeachment, violated the Sixth Amendment's guarantee of the right of confrontation.

If refusal to allow cross-examination of a key witness for bias violates the right to confrontation of a state habeas petitioner, Davis v. Alaska, 415 U.S. 308 (1974), it would seem to follow that a violation of equal or greater magnitude occurs where the prosecution affirmatively acts to prevent a defendant from finding a prosecution witness and learning impeachable facts about that individual. This is so, because if the impeachable facts are known to a defendant they may be brought into the trial in some other way upon occasion.

The Ninth Circuit has gone so far as to say that violation of the confrontation clause requires " . . . reversal if there is any error(,)" and ". . . whether the error was harmless in the particular case is not considered." Chipman v. Mercer, 628 F.2d 528 (9th Cir. 1980).

Alford v. United States, 282 U.S. 687 (1931), held that the refusal of the trial court to permit cross-examination as to the true name or place of residence of a prosecution witness was a violation of the right of confrontation, without even a showing that the cross-examination, if pursued, would have brought out facts discrediting the witness.

Relying on Alford was Smith v. Illinois, 390 U.S. 748 (1968), where the trial court permitted defense counsel to ascertain that "James Jordan," the name he testified under, was not the witness' true name, but refused inquiry as to his real name or his address. This court held that to be a violation of the Sixth and Fourteenth Amendments without a further showing.

Concealment of Cozad's address and her real name was tantamount to concealment of her identity under Alford and Smith. And unlike those two cases, there was demonstrable prejudice, since Cozad could have been impeached. Thus, the violation of the Sixth Amendment is more grievous than in Alford or Smith.

The only reported case the petitioner could find involving this issue was in United States ex rel. Annunziato v. Manson, 425 F.Supp. 1272 (D. Conn. 1977), affd, Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977), where the district court held that a state habeas prisoner was denied the right to confrontation by the failure of the State to disclose exculpatory evidence concerning the bias of a key witness for the prosecution; that denial of the right to effective cross-examination was constitutional error of the first magnitude which no amount of showing of want of prejudice would cure, citing Davis v. Alaska.

The federal courts below analyzed this issue exclusively in terms of the Agurs-Brady standards, not under Davis, despite the fact that this was the only basis urged in the Court of Appeals. The State, in response to the petitioner's request for rehearing, argued that this case had to be decided under Agurs because the right to confrontation could only be abridged by curtailing cross-examination. Other than the Annunziato case, supra, this case appears to be one of first impression, a novel issue.

It is desirable that this court speak to the issue of whether prosecutorial concealment of impeachment information - a common occurrence which leads to many appeals --must be judged under the "material" standard of Agurs or should be judged under the right to confrontation clause.

A defendant is entitled surely to know who is testifying against him, and whether he is prevented from knowing that by the action of the prosecutor or by the trial court should have no constitutional significance. The Sixth Amendment must protect against prosecutorial error as much as it protects against judicial error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LARRY P. CRAMER, Defendant-Appellant.

Fourth District No. 14061

Judgment affirmed.

Opinion filed October 12, 1978.

Mr. JUSTICE TRAPP delivered the opinion of the court:

Defendant appeals his convictions of conspiracy to commit murder (three counts), and solicitation to commit murder (six counts), entered upon jury verdicts.

Defendant's post-trial motion alleged some 70 errors, most of which are argued in defendant's brief. Upon *pro se* oral argument it is contended that the cause should be reversed for accumulated error and the argument was directed to the several errors discussed severally hereafter.

The sum of the allegations of the indictment is that between February 1974 and December 13, 1974, defendant conspired with a client, Weathington, to murder defendant's wife and that within such period defendant agreed and requested and encouraged Weathington to commit murder. (Ill. Rev. Stat. 1973, ch. 38, pars. 8—1 and 8—2.) On November 18, 1974, Weathington advised both the police and the State's Attorney of the schemes which are the subject of the prosecution and cooperated with them in the recording of certain conversations between the conspirators. He testified in behalf of the prosecution, both before the grand jury and at trial. Defendant's wife testified in behalf of the defendant. Defendant did not testify.

The trial court instructed the jury upon the issues of conspiracy in the language of IPI Criminal No. 6.04. The operative words considered here are, "Third. That an act in furtherance of the agreement was performed by any party to the agreement."

Defendant objected to the giving of the instruction for the reason that it failed to set forth the specific acts alleged in the indictment, and that it failed to require that one or more of the overt acts so alleged be proven beyond a reasonable doubt. The testimony includes and concerns acts of defendant and Weathington, any one of which may be deemed overt acts in furtherance of the conspiracy but which are not actually charged or alleged in the indictment.

The defendant also tendered an instruction which modified IPI Criminal No. 6.04, by stating in such third paragraph the overt acts which the indictment alleged were performed by defendant. The indictment did not allege any overt acts performed alone by the co-conspirator, Weathington. Defendant's tendered instruction was refused.

Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2) defines the elements of conspiracy. That definition concludes with the sentence:

> "No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is *alleged* and proved to have been committed by him or by a co-conspirator." (Emphasis supplied.)

During the period when the co-conspirator, Weathington, was cooperating with the police, certain telephone conversations of the alleged conspirators were recorded. The recordings were played before the jury during the course of the trial.

Shortly after retiring the jury requested a transcript of the several recordings. The trial judge concluded that such transcripts were not offered into evidence and could not be sent to the jury. The jury then requested that the tapes and a machine to play them be provided. The request was denied because of the judge's concern that the tape recordings might be damaged or erased.

After the jury had deliberated some 20 hours, the trial judge and counsel conferred on the record. At that time the judge stated that he would ask whether or not the jury was making progress, saying:

> "I propose to take the jury into the courtroom and inquire if they are making progress and if he says no, the foreman, and I propose to inquire of the foreman if playing the tapes would be helpful in arriving at a verdict. If he says yes, I then propose to ask each of the jurors as well. If each member of the jury says yes, I'm going to play the tapes for them *in camera* in the courtroom with only the defendant, his attorney, attorney for the people and the court being present."

Defendant's counsel objected to the playing of the tapes at such time after the prior jury request had been refused, asserting such to be an abuse of discretion and argued that playing the recording at that time would be a prejudicial emphasis upon the testimony. He also asked that certain defense cross-examination and evidence be reread to the jury. The court advised that he would not allow such defense testimony to be reviewed unless the jury asked for it.

The jury was returned to the courtroom and, upon inquiry, the foreman advised that he was of the opinion that the jury *was* progressing in its deliberations. The judge then asked:

> "Would it help, in your opinion, in this case if you were to hear the tapes played here in the courtroom?"

The foreman responded affirmatively as did each juror upon individual inquiry. The recordings were again played and the defendant's objections, together with a motion for a mistrial, were denied. The jury returned a verdict within 45 minutes. The issue is preserved in the post-trial motion.

The prosecution argues that there was a proper exercise of discretion in suggesting the replay of the recording because the previous denial may have discouraged renewal of the request although the jury may have continued to be uncertain or confused.

Certain other issues preserved in the post-trial motion and briefed and argued on appeal are noted.

Defendant argues that the issues instruction, IPI Criminal No. 6.04, was erroneous in that, while it required the prosecution to prove that the conspirators agreed to commit the crime, it did not require the State to prove that they intended to agree. The words "intended to agree" appear to be directed to the notion that they agreed to conspire. Thus, defendant alleges that the trial court erred in denying his tendered instruction, IPI Criminal No. 6.03, modified to read, "intends to, and does agree with another." He cites P. Marcus, *Criminal Conspiracy: The State of Mind Crime*, 1976 U. Ill. L. F. 627.

We find that the study is directed toward the law required in Federal convictions. 18 U.S.L.A. §371 (1966) provides, "If two or more persons conspire * * * to commit any offense * * *." We note that the former Illinois statute (Ill. Rev. Stat. 1961, ch. 38, par. 139) defined conspiracy in the language "[i]f any two or more persons conspire or agree together * * *."

The present statute defining conspiracy uses different language. Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2) provides, "A person commits conspiracy when, with intent that an offense be committed, *he* agrees with another * * *." (Emphasis supplied.)

Under the prior Illinois statute it was held that at least two parties with a common criminal intent are necessary to conspiracy, and where there are but two parties an acquittal of one required the discharge of the other. (*People v. Cohn* (1934), 358 Ill. 328, 193 N.E. 150.) It was held that more than one person must be guilty to sustain a conviction. *People v. Nathanson* (1945), 389 Ill. 311, 59 N.E.2d 677.

The present statute, however, specifically provides that these holdings are no longer effective. The present statute states in section 8—2(b) that:

> "It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:
>
> (1) Has not been prosecuted or convicted, or
>
> * * *
>
> (4) Has been acquitted, * * *." (Ill. Rev. Stat. 1973, ch. 38, par. 8—2.)

Citing the present Illinois statute defining conspiracy, Marcus notes:

> "Traditionally, courts analyzed the state of mind of *both* conspirators (the conspiracy requirement referred to two or more conspirators) to determine if more than one defendant intended to agree. If only one of the two conspirators meant to agree, and the other 'conspirator' only feigned agreement or had actually contacted the police, the state of mind necessary for a conspiracy would not exist; at least two parties must intend to enter into the conspiratorial relationship. More recently, however, the trend has

been away from requiring proof of an agreement by more than one defendant. The focus now is on the state of mind of the defendant on trial. This so-called 'unilateral approach' allows for the conviction of the defendant even if his 'co-conspirator' never intended at any time to enter into an agreement with the defendant. Typically, the unilateral approach statutes require that a court only focus on the intent of the accused to enter an agreement. The mental state of the defendant's co-conspirator is largely irrelevant." 1976 Illinois Law Forum 627, 628.

•1 By reason of our present statute we conclude that the intent to agree which defendant argues is encompassed within the language which requires allegations and proof that defendant agreed with another to commit an offense.

•2 Defendant argues that since the prosecution introduced evidence of motive, the trial court erred in denying his tendered instruction modifying IPI Criminal No. 3.04 to include "The State is required to prove a motive for the commission of the crime charged." The prosecution did not tender IPI Criminal No. 3.04. In *People v. Enright* (1912), 256 Ill. 221, 234, 99 N.E. 936, 941, the court said that if the accused committed the act, the question whether he had a motive or what it was is immaterial. While evidence tending to show the existence or nonexistence of the motive is admissible and the People may so show, they are under no obligation to do so. The opinion continues to state:

> "If the People claim that a motive existed inducing the commission of the act it must be proved, and, like any other circumstance, cannot be inferred, but as they are not required to show any motive a jury *should not be* informed that failure to show it tends to prove that the crime was not committed. • • •." (Emphasis supplied.) (256 Ill. 221, 234, 99 N.E. 936, 941.)

In *People v. Manzella* (1974), 56 Ill. 2d 187, 306 N.E.2d 16, the court stated that IPI Criminal No. 3.04 is to be used where the State had not attempted to prove motive. We conclude that defendant's argument misstates the rule of *Enright* and *Manzella*.

Defendant urges that the court committed reversible error in admitting into evidence what is termed evidence of other crimes. We summarize rather than detail the substance of the matter.

Weathington testified to the circumstances initiating the solicitation and conspiracy. Defendant had represented him as a client which apparently entirely consisted of criminal matters. The witness called at defendant's office in February 1974 to request a loan of $20. Defendant asked whether there was security and Weathington stated that he had some marijuana. Defendant inquired whether it was of good quality and smoked some in a pipe. There was no objection. The testimony is that during the course of the transaction defendant inquired whether the witness would like to make some money and the latter expressed interest. Without then naming the victim defendant proposed that Weathington assist in getting rid of someone. In a series of subsequent conversations,

Weathington was told the identity of the victim and various sums to be paid to Weathington were discussed. There followed suggestions and discussions regarding a series of schemes and methods for causing the death of the victim. The last proposal was that Weathington find a "hit man."

Weathington further testified that during later conversations he spoke to defendant regarding the then scheme of carrying out the conspiracy. At that time defendant stated that it was necessary to delay their preparations for the reason that there was some difficulty arising from his extramarital affair with the wife of a client. Defendant made objection and argued that the testimony was inadmissible, asserting prejudice. The prosecution suggested that the evidence was admissible to show motive and defendant's motions for mistrial were denied.

The prosecution failed to produce any further testimony concerning the extramarital problem which tended to establish motive. At the close of the prosecution's case, the court orally instructed the jury that "any evidence received in regards to the use of marijuana or immoral conduct was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington."

The written instructions included the language of IPI Criminal No. 1.01(6) regarding evidence admitted for a limited purpose. Defendant argues that the instruction was so delayed that the prejudice was not cured.

We agree with the trial court's conclusion that the testimony was relevant to the issues. In *People* v. *Manzella* (1974), 56 Ill. 2d 187, 196, 306 N.E.2d 16, 20, defendant argued prejudicial error in the admission of evidence of other assaults upon the victim. The evidence was held to be admissible, the court saying:

> "It is true, nevertheless, that evidence relevant to the main issue, and which serves to place the defendant in proximity to the time and place of the offense and which aids or establishes identity, and tends to prove design, motive, or knowledge, is admissible as an exception to the general exclusionary rule barring such evidence."

In *People* v. *Durso* (1968), 40 Ill. 2d 242, 239 N.E.2d 842, defendant, who was charged with murder, urged error in admitting evidence of narcotics transactions. The court stated the test for admission of evidence of other crimes was whether the evidence was so closely connected with the main issue that it tends to prove guilt of the crime charged.

The opinion in *People* v. *Tranowski* (1960), 20 Ill. 2d 11, 16, 169 N.E.2d 347, 349, states that other "crimes" which are wholly independent of and disconnected from the crime charged are not admissible, but continued:

> "But a corollary of the rule is that evidence, relevant to the main

issue, which serves to place a defendant in proximity to the time and place, aids or establishes identity, and tends to prove design, motive or knowledge, is admissible. [Citation.] Resolution of the conflict between the rule and the corollary depends on whether the evidence of other crimes is so closely connected with the main issue that it tends to prove the accused guilty of the crime for which he is being tried."

•3 The evidence at issue here was clearly intertwined with the negotiation and the progress of the conspiracy. It did not concern wholly independent and unrelated conduct clearly apart from the offenses charged. The transaction concerning a loan "secured" by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington would be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

The testimony concerning the extramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plans for carrying out the conspiracy. It was presented to the jury in the context of the course of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

At the time that defendant objected to the testimony, the prosecution suggested the showing of evidence of motive. At that time the trial judge had no way of ascertaining the fact. At the close of the case in chief when all evidence regarding motive was disclosed to him he did instruct the jury of the limited purpose in the consideration of the jury.

•4 The argument that the rulings were too long delayed is not persuasive. Logically, it seems that orally instructing at the close of all prosecution evidence would more effectively impress than rulings scattered throughout the several days of testimony. We find no reversible error upon these issues.

Defendant argues that the trial court erred when it denied a motion to suppress certain electronic recordings, called "tapes," for the reason that it was not done in compliance with the then statute (Ill. Rev. Stat. 1973, ch. 38, par. 14—2(a)). That statute prohibited the use of eavesdropping devices unless such was done with the consent of one party and at the request of the State's Attorney. On four separate days telephone calls from Weathington to defendant were made from an investigating office. The recording device was attached to the telephone in that office and had no connection to defendant's telephone or its connecting lines. An assistant State's Attorney was present on each occasion.

The State's Attorney testified that he made a request for monitoring of

each call and that he had designated a named assistant to be in charge of such portion of the investigation. Each act of monitoring followed the request for that recording by the assistant State's Attorney and he was present. A fifth occasion involved the arrangement whereby Weathington wore a device which transmitted the conversation by radio and which was recorded.

The record shows no indiscriminate broad authority given to police officers to monitor defendant's conversations at their own discretion as in *People* v. *Porcelli* (1974), 25 Ill. App. 3d 145, 323 N.E.2d 1. In *People* v. *Richardson* (1975), 60 Ill. 2d 189, 328 N.E.2d 260, the Supreme Court determined that the State's Attorney had a large discretion in administering his duties in the authorization of eavesdropping activities. In *People* v. *Marlow* (1976), 39 Ill. App. 3d 177, 350 N.E.2d 215, the State's Attorney's request included the delegation of authority to a named assistant to authorize that it was done. The recorded evidence was held admissible. Here, as there, the assistant State's Attorney designated and specified the date and occasion for each recording. (See also *People* v. *Holliman* (1974), 22 Ill. App. 3d 95, 316 N.E.2d 812.) Defendant's argument that the State's Attorney gave "permission" rather than made a request is without merit.

●5 The several recordings occurred throughout a period of some three weeks. Defendant argues that that was an unreasonable period of time to authorize such recordings. We find the record supports the conclusion that each recording was made upon separate and distinct authorization.

●6 We have examined defendant's argument that there was not sufficient foundation to show the quality and accuracy of the recordings to permit their admission into evidence. We find no merit upon this point.

Defendant's argument that it was error to play the tapes in their entirety during the course of the trial is directed to the fact that they included conduct and references to conversations between Weathington and defendant which we have heretofore held admissible.

Defendant argues that the trial court erred in permitting the State's Attorney to play six portions of the tapes during the course of his argument. This record simply shows argument by the State's Attorney with a transcript notation that a portion of a tape was played. Neither the text heard nor the duration of the recording can be ascertained. Defendant likens the playing of the recording to the reading from a trial transcript during the course of an argument. Such has been considered to be error for the reason that there was an overemphasis of selected testimony. In *People* v. *Birger* (1929), 329 Ill. 362, 160 N.E. 564, however, it was held permissible for a State's Attorney to make a paraphrased recapitulation of testimony where his recollection had been refreshed

from notes or a transcript. In *People* v. *Morse* (1975), 33 Ill. App. 3d 384, 342 N.E.2d 307, *cert. denied* (1976), 426 U.S. 953, 49 L. Ed. 2d 1191, 96 S. Ct. 3179, it was held that a brief reference to the transcript was not reversible error. In *People* v. *Davies* (1977), 50 Ill. App. 3d 506, 365 N.E.2d 628, the court concluded that it was within the discretion of the trial court to permit the reading of a trial transcript during closing argument. That opinion noted the recent decision in *People* v. *Pierce* (1974), 56 Ill. 2d 361, 308 N.E.2d 577, which determined that it was within the discretion of the trial court to permit a jury to have a review of testimony after it retired to deliberate. That opinion states that the use of paraphrased recollection by an attorney penalized accuracy without necessarily reducing the emphasis of such testimony, and under the rationale of *Pierce* found no abuse of discretion in permitting the reading of a transcript which was "not so extensive as to unduly emphasize the testimony at issue * * *." (*Davies*, 50 Ill. App. 3d 506, 514, 365 N.E.2d 628, 634.) From this record it cannot be ascertained whether the recording played was so extensive as to produce a substantial prejudice.

The two principal issues have been stated but not yet reviewed.

•7 The trial court instructed the jury upon the issue of conspiracy in the language of IPI Criminal No. 6.04. The members of the panel agree that such instruction was error, in the light of the language of section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2), providing:

> "No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator."

A majority of the panel concluded, however, that the evidence of defendant's guilt is so overwhelming that the error may be treated as harmless. Judge Trapp is of the opinion that the error is such a deviation from the law and precedent that reversal is required. He so concludes upon the authority of *People* v. *Dorsey* (1936), 363 Ill. 403, 2 N.E.2d 321; *People* v. *Galvan* (1976), 42 Ill. App. 3d 360, 356 N.E.2d 139, and *People* v. *Dickerson* (1976), 41 Ill. App. 3d 464, 353 N.E.2d 427.

In *Dorsey*, defendant was charged with conspiring to purchase for others the conspirator's securities at exorbitant and extortionate prices. The trial court refused defendant's tendered instructions designed to limit the jury's considerations to the allegations of a bill of particulars restricting the charge to allegations that certain securities were fraudulent and worthless. The trial court submitted the issues upon allegations regarding the extortionate charges. In reversing and remanding, the reviewing court held that the issues must be limited to the allegations stated in the bill of particulars, stating:

> "None of the given instructions refer in any way to the bill of particulars or to the charge set forth in it. Obviously, the defendants were entitled to have the jury instructed on the issue as to which the prosecution was limited and upon which they were tried, and not upon some other and different issue." 383 Ill. 403, 408, 2 N.E.2d 321, 323.

In *Galvan*, defendants were charged with rape and conspiracy to commit aggravated kidnapping. The reviewing court found plain error arising in the fact that the issues instruction upon the charge of conspiracy was framed in terms of a conspiracy to commit rape and contained no mention of the elements of a conspiracy to commit aggravated kidnapping. In reversing and remanding, the reviewing court said that the jury must be instructed upon the offense charged.

In *Dickerson*, defendant was charged with receiving stolen property. The court determined that an element of that offense was defendant's knowledge of the fact that the property was stolen when he received it. The sum of the instructions, however, would permit the jury to convict defendant upon a separate offense of possession of stolen property. The latter was an offense for which defendant was not charged. The court said:

> "It is elementary, however, that a defendant may be convicted of only the offense with which he is charged, not of another offense with which he might have been charged." (41 Ill. App. 3d 464, 467, 353 N.E.2d 427, 428.)

It was determined that the error required reversal. In the light of the requirements of the statute, we conclude that there was reversible error in giving the issues instruction tendered by the defendant.

●8 The majority of the panel also conclude that any error arising from the trial court's offer to replay, and to the subsequent replaying, of the "tapes" of defendant's telephone conversations with Weathington was harmless beyond a reasonable doubt by reason of the fact that the evidence of guilt was overwhelming. Judge Trapp concludes that upon this record, the trial court abused its discretion for the reason that the jury might readily infer and conclude that the trial court considered such evidence critically important.

No cases have been found which report instances where a trial judge has proffered to review the selected testimony after the jury has retired. The opinion in *People v. Pierre* (1974), 56 Ill. 2d 301, 308 N.E.2d 577, established the rule that it is within the discretion of the judge to determine whether a jury's request to review testimony heard during trial be allowed. A dissenting opinion would adopt the view of the ABA Standards, *Trial by Jury* §5.2 (1968), that the trial judge must grant the

jury's request where the evidence directly relates to an issue before the jury. The question here, however, is *not* whether the court abused its discretion in refusing the jury's request to play the recording, but rather whether there was an abuse of discretion in volunteering and directing the jury's attention to specific prosecution evidence, and inquiring whether it would aid in reaching the jury's verdict.

The latter view is founded upon consideration of the authority of *People v. Baltimore* (1972), 7 Ill. App. 3d 633, 288 N.E.2d 659, and *People v. Golub* (1929), 333 Ill. 554, 165 N.E. 196.

In *Baltimore*, the jury reported that it was unable to reach a verdict in a murder trial after 15 hours of deliberation. The judge inquired whether the jury could reach a verdict without regard to the death penalty. The reviewing court concluded that as a matter of plain error the inquiry might be construed by the jury to indicate an opinion of guilt and for such reason reversed and remanded.

In *Golub*, the jury had been deliberating for 4 hours. The foreman reported that they had not reached a verdict. The trial judge remarked that the jury should have no difficulty in reaching a verdict upon the evidence presented. The opinion states:

> "The juror, as well as the judge, has an independent duty to perform, and he ought to be left free to pronounce his own conviction. A verdict hastened by the action of the judge, however worthy the motive, cannot be the result of that deliberation which the law guarantees. Remarks by a trial judge calculated to effect the rendition of a verdict without affording the jury an opportunity for careful consideration are unwarranted and often lead to great abuse. Whether the error is harmless or prejudicial depends upon the facts of the case." 333 Ill. 554, 561, 165 N.E. 196, 199.

In the context of whether the error was prejudicial or harmless, the opinion noted that the trial judge's remarks did not either expressly, or by implication, indicate that the jury should reach a particular conclusion. The record did not disclose how long the jury deliberated after they had retired a second time.

Here, the testimony concerned events occurring over a period of 11 months. The report of the foreman that the jury was progressing to a verdict negates any suggestion that the jury was then unable to reach a verdict, or was confused or uncertain concerning the evidence. The record discloses that the jury had continued to deliberate some 20 hours after the refusal of the initial request to hear the recording. This suggests that the jury members were not prevented from reaching a verdict because they could not recall or were uncertain about the testimony heard. This record does show that a verdict was returned within 45

minutes following the replaying of the "tapes." As distinguished from the facts in *Golub*, it is reasonable to conclude that the playing of the "tapes" upon the suggestion of the trial judge had a prejudicial consequence.

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

CRAVEN and REARDON, JJ., concur.

Judgment of the trial court

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) Criminal Nos.
) 74-X-1967 and
LARRY P. CRAMER,) 73-X-159
Defendant.)

And now come the People of the State of Illinois by Assistant Attorney Generals Locher, Burnham and Resch, and said Defendant, Larry P. Cramer, is present in open Court with his Attorney, Donald M. Tennant.

At 2:50 P.M. the jury returns into open Court with the following verdicts:

"We, the jury, find the defendant Larry P. Cramer, Guilty of Solicitation to Commit Murder."

"We, the jury, find the defendant Larry P. Cramer, Guilty of Conspiracy to Commit Murder."

Jury polled at request of Defendant's Attorney.

Judgment entered on the findings of the jury.

April 16, 1975. EDWARD LEE WEIKE, Judge.

Judgment of the Supreme Court of Illinois

Leave to appeal denied, 74 Ill.2d xx (1979), on January 25, 1979. No written decision.

Judgment of the United States District Court

MEMORANDUM OPINION
AND ORDER

The petitioner seeks a writ of habeas corpus, pursuant to 28 U.S.C. Section 2241 and 28 U.S.C. Section 2254. Both the petitioner and the respondent have moved for summary judgment pursuant to Fed. R. Civ. P. 56. No factual issues are in dispute and summary judgment is an appropriate disposition.

The petitioner was convicted on April 16, 1975, in the Circuit Court of Champaign County, Illinois, of solicitation to commit murder and of conspiracy to commit murder. He was sentenced to imprisonment for one to three years. The Petitioner appealed his conviction to the Illinois Appellate Court, Fourth District and on October 12, 1978, that court affirmed his conviction. People v. Cramer, 64 Ill. App.3d 688, 381 N.E.2d 827 (1978). The Illinois Supreme Court denied leave to appeal on January 25, 1979, (No. 51432), and the United States Supreme Court denied certiorari on October 1, 1979. 444 U.S. 828. The petitioner has exhausted his state remedies, a prerequisite to jurisdiction vesting in this court.

Only errors of federal constitutional magnitude may be raised by a state prisoner in federal habeas corpus proceeding. Woods v. Estelle, 547 F.2d 269 (5th Cir. 1977) cert. denied, 434 U.S. 902. Errors or mistakes of law committed in the conduct of a trial are not subject to review by this court unless the errors constitute a denial of fundamental fairness essential to the very concept of justice. Woods v. Estelle, supra. The petitioner, who has the burden of proof in these matters, alleges six such denials.

L.

The petitioner first alleges that he was denied trial by jury and due process of law by the trial court's inquiry directed to the jury during their deliberations as to whether they would find it helpful to listen once more to tape recordings of conversations between the petitioner and his alleged co-conspirator and by replaying those tapes to the jury. Inquiry here is limited to whether the trial judge's actions affected the fundamental fairness of the trial. United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972) cert. denied, 409 U.S. 860. While the state appellate court held the inquiry to be harmless error, an independent determination upon constitutional grounds is required by the application for the writ.

The undisputed facts are that shortly after retiring, the jury requested a transcript of the tape recordings. The request was refused because the transcripts had not been admitted into evidence. The jury then requested that the tapes and a player be sent to the jury room. This request was also refused due to the trial court's concern that the jury might damage or erase the tapes. After the jury had deliberated for 20 hours, the trial judge called the jury into open court in the presence of the prosecution and the defendant and his counsel and inquired whether progress was being made in the deliberations. The response was affirmative. The judge then asked whether replaying the tapes would be helpful to the jury's deliberations. Again, the response was affirmative, and the tapes were played. The jury reached a verdict 45 minutes later.

While the actions of the trial judge in this case must be viewed with grave concern, this court cannot conclude that those actions were a totally unsolicited intrustion nor that they affected the fundamental fairness of the trial. Because the jury heard the tapes replayed, it cannot be concluded that the fundamental fairness of the trial was affected. Had the tapes beeen replayed immediately after the jury made their request the judge would have acted well within his discretion.

Did the timing and the affirmative action of the judge then, in inquiring of the jury, undermine the fairness of the proceeding? It is axiomatic that a jury should be left alone during deliberations and while perhaps the belated inquiry was ill advised, this court cannot conclude under these facts that a constitutional violation occurred. The jury had requested a review of the evidence and been denied it for reasons unrelated to the propriety of the request. The trial judge is vested with the discretion to decide what evidence may be helpful or harmful to the jury's proper deliberations. People v. Bell, 44 Ill. App.3d 185, 357 N.E.2d 1256 (1976). While a prompt decision on such matters is preferable, the trial judge cannot be said to have lost forever his opportunity to reconsider his ruling, especially where it becomes apparent from the length of deliberations and the jury's questions that the jury believes that reviewing certain evidence would aid them in their task.

Unfortunately, neither side has been able to point out relevant authority with similar facts. The case most closely in point is People v. Reynolds, 57 Ill.App.3d 595, 273 N.E.2d 650 (1978), where the curt held that it was not an abuse of discretion for the trial judge initially to deny a jury request to hear testimony again on the ground that it would impede the progress of the case and then, following consultation with counsel, to inquire of the jury what specific testimony they wanted and then grant their request. While the time elapsed between the jury's request and judge's inquiry was greater in this case than in Reynolds, whether the trial judged abused his discretion is not a proper question for this court to decide. The court does conclude that the petitioner's rights to trial by jury and to due process of law were not infringed by the state trial judge's actions.

II.

The petitioner next makes two interrelated arguments: 1) that he was denied due process of law by being convicted on a general verdict of conspiracy when two of the four conspiracy counts against him

were dismissed after trial; and 2) that he was denied trial by jury and due process of law because the jury was never instructed what specific overt acts were alleged or had to be proved under the conspiracy charge. The petitioner's arguments have merit. Each of the four conspiracy counts in the indictment charged the petitioner with conspiracy but each alleged different overt acts performed in furtherance of the conspiracy. At trial, the petitioner contended that the two counts alleging overt acts performed after November 18, 1974, the date the petitioner's alleged co-conspirator became a police informant, should be dismissed because under Illinois law no conspiracy existed after that date. The trial court allowed the case to go to the jury on all four counts of conspiracy and the jury returned a general verdict of guilty of conspiracy. After trial, the judge dismissed two of the four conspiracy ounts as invalid under Illinois law. It is impossible however, to determine upon which counts, or which overt acts, the jury relied. This is true not only because of the form of verdict, but also because the jury was not informed by instructions, by argument or by reading the indictment what specific overt acts were charged.[1] Therefore, not only could the jury

1 The jury was given Illinois Criminal Pattern Jury Instruction #6.04 on conspiracy, which states only, in relevant part, that the State must prove ". . . that an act in furtherance of the agreement was performed by any party to the agreement."

have based its verdict on the overt acts charged in the invalid counts but they also could have relied upon an overt act not even charged. It follows that the conspiracy verdict cannot be sustained.

It is a well settled doctrine of law that a verdict must be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected. Yates v. United States, 354 U.S. 298 (1957); Williams v. North Carolina, 317 U.S. 287 (1942); Stromberg v. California, 283 U.S. 359 (1931). In Yates, the jury had returned a general verdict of guilty of conspiracy to advocate violent overthrow of the government or to organize the Communist Party. The Court determined

that the statute of limitations had run on the "organizing" charge, but was unable to tell either (1) upon which provision of the statute the jury had relied, or (2) whether the overt act found by the jury was in furtherance of the advocacy or the organizing provision. The verdict, therefore, was set aside. Similarly, in Williams, the case was tried and submitted to the jury to two theories, one of which later was held invalid. The verdict did not specify the theory relied upon and so tthe conviction was overturned. In Stromberg, a general verdict was returned under a statute prohibiting three different activities. Later one prohibition was held to be unconstitutional. The jury was instructed that a verdict could be returned on any activity independently considered. The state court held that the verdict could be sustained if any one of three possible bases was valid. The Supreme Court reversed the state court. The Court held that where one provision under the statute was unlawful, the conviction could not be upheld if it was impossible to say under which clause of the statute the conviction was obtained.

In this case it is impossible to tell whether the jury found an overt act under the valid or the invalid counts, or even whether the verdict was based upon an overt act that had been charged. The general verdict of guilty of conspiracy cannot be upheld. It is a denial of due process.

III.

The petitioner's concurrent sentence will stand, however, if his conviction under the solicitation count is found to be valid. The petitioner argues that he was denied due process of law and his rights under the Sixth Amendment in being tried and convicted on an indictment for solicitation which did not state a crime because it pleaded the statutory language rather than the actual words or substance of the words used by the petitioner. The petitioner's argument is without merit.

As a general proposition, the sufficiency of an indictment is not reviewable in habeas corpus proceedings. Knewel v. Eagan, 268 U.S. 442 (1925). Habeas corpus can be invoked with respect to an indictment only where it is so fatally defective that under no circumstances could a valid conviction result from facts provable under that indictment. Johnson v. Beto, 383 F.2d 197 (5th Cir. 1968).

In the indictment under which the petitioner was tried, solicitation was charged in the statutory language that the petitioner "did request" or "did encourage" Charles O. Weathington to murder Judy Cramer.[2]

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2 Ill. Rev. Stat., ch 38 Section 8-1 (1977) provides in relevant part that "a person commits solicitation when with intent that an offense be committed he commands, encourages, or requests another to commit that offense."

The petitioner argues that a charge of solicitation is analogous to a charge of perjury in that it can be committed only by the use of words. Therefore, he claims, since words are both the offense and the means of committing the offense, a charge of solicitation must state the words used, either verbatim or in substance.

In People v. Powell, 72 Ill.2d 50, 377 N.E.2d 803, cert. denied, 440 U.S. 907 (1979), the court upheld an indictment for solicitation to obstruct justice, stating that an indictment which charges an offense in the language of the statute is sufficient when the statute itself apprises the defendant with reasonable certainty of the precise offense charged. In People v. George, 67 Ill.App.3d 102, 384 N.E.2d 377 (1978), the court upheld an indictment for solicitation which charged that the defendant requested a certain individual "to arrange for" a murder. The court held that the sufficiency of an indictment is tested by determining whether it contains the elements of the offense intended to be charged, sufficiently apprises the defendant of the nature of the offense so as to enable him to prepare a defense, and sufficiently identifies the specific offense to protect a defendant from double jeopardy.

It is clear that the precise words allegedly used by the petitioner in this case were not necessary to inform him of the solicitation charge against him, nor to enable him to prepare a defense, nor to identify the offense for use in any future plea in bar. The prosecution's case did not require proof that any particular words were spoken by the petitioner. The indictment cannot be characterized as "so fatally defective that under no circumstances could a valid conviction result from facts provable under the indictment." Johnson v. Beto, 385 F.2d at 198, and it cannot be the basis for habeas corpus relief.

IV.

The petitioner next alleges that he was denied due process of law by the state's concealment of evidence favorable to the defense. The petitioner misstates the constitutional test in a habeas corpus proceeding. Counsel's proper adherence to discovery rules is not a matter of concern in a habeas corpus proceeding. It deals with the petitioner's right to a fair trial mandated in the due process clause of the Fourteenth Amendment. As the United States Supreme Court stated in United States v. Agurs, 427 U.S. 97 (1976), "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 109-110.

The state does not violate the constitutional duty of disclosure of exculpatory information unless the omission is of such importance that it denies the defendant a fair trial. The Agurs court held that,

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is not justification for a

> new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. Id. at 112-113. (Emphasis added.)

The petitioner alleges that the state concealed the following exculpatory material relating to the prosecution witness, Patty Cozad:

1. that the witness testified under an alias; that her real name is "Patty Stafford.";
2. that the state failed to reveal her address, despite the petitioner's repeated requests;
3. that she used narcotics;
4. that she had a felony charge for possession of narcotics pending in the same court at the time of her testimony;
5. that she had recently been convicted of a crime invovling dishonesty;
6. that a month prior to her testimony she sold narcotics to agents of the Illinois Bureau of Investigation, one of whom was the chief investigator in the petitioner's case;
7. that she had a drug-related connection to Mary Johnson, the woman with whom the petitioner was allegedly having an adulterous affair.

The substance of Cozad's testimony was that she and Weathington, the petitioner's alleged co-conspirator, were in Chicago together on September 26 and 27, 1974, and that Weathington purchased a knife there. Her testimony tended to corroborate that of the prosecution's chief witness, Weathington. The petitioner says that Cozad's testimony lent unwarranted credibility to Weathington and that concealing the information impeded both the impeachment of Cozad and the defense investigation of any concerted action among Johnson, Cozad, and Weathington directed against petitioner. The state disclaims any knowledge concerning the petitioner's claims in #1, #4, #5, and #6.

Assuming, arguendo, that the prosecution had knowledge of each of the allegedly exculpatory items of information, the court cannot conclude that, even considered in their totality, they "create a reasonable doubt that did not otherwise exist" of the petitioner's guilt. United States v. Agurs, supra; United

States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977). The testimony of Patty Cozad was cumulative and tangential. The events she described had already been testified to by the chief prosecution witness, Weathington. Cozad was not an eyewitness to the alleged solicitation or to any concerted activity between the petitioner and Weathington and gave no testimony as to those events. No claim is made that her testimony was perjured; nor does it appear that Ms. Cozad was presented in a totally innocent light. She testified that, on an overnight trip, she accompanied a man to Chicago who was planning to help murder another man's wife. The court cannot conclude that a further discrediting of her character would have been of such import as to create new doubt of the petitioner's guilt. Turning specifically to the request for Ms. Cozad's address, while the prosecution failed to respond to the request, the petitioner again has made no showing that the address would have tended to exculpate him or to affect the outcome of the trial. The court cannot conclude that the address was material to the issue of the petitioner's guilt. Brady v. Maryland, 373 U.S. 83 (1963). No constitutional violation resulted from concealment of exculpatory evidence.

V.

Finally, the petitioner contends that he was denied due process of law by the cumulative effect of erroneous evidentiary rulings. The federal courts possess only limited authority to review such evidentiary rulings in a habeas corpus proceeding by a state prisoner. Nordskog v. Wainwright, 546 F.2d 69 (5th Cir. 1977). This court cannot interfere with a state court's evidentiary rulings unless the errors involved reasonably can be said to amount to a deprivation of constitutional rights. United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied 409 U.S. 860. Before mistakes in the admission of evidence rise to a constitutional plane, they must be material in the sense of being a crucial, critical, highly significant factor in the outcome of the case, Anderson v. Maggio, 555 F.2d 447 (5th Cir. 1977). Habeas corpus is not a proper remedy because

the state court's challenged conduct would have led to reversal if the defendant had been tried in the federal system, nor because the state evidentiary rules have been violated. Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977).

The petitioner has alleged some nine erroneous evidentiary rulings by the state trial court. First, he claims that the court admitted testimony that he accepted and smoked marijuana from Weathington as collateral for a loan. The trial court admitted the testimony on the basis of People v. Billburg, 314 Ill. 182 (1924), which held that in a conspiracy case some latitude is permitted in the proof to show the relationship of the parties and the object and purpose of the conspiracy. The trial court gave a limiting instruction that the evidence was admitted only to show the relationship between the petitioner and Weathington. The state appellate court upheld the ruling of the trial court,

> It (the evidence) did not concern wholly independent and unrelated conduct clearly apart from the offenses charged. The transaction concerning a loan 'secured' by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington might be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

While it is possible to characterize the evidence as irrelevant, it cannot be characterized as a "curcial, critical, highly significant factor." Anderson v. Maggio, supra. No error of constitutional magnitude was committed by its admission.

Second, the petitioner argues that the state court erroneously admitted Weathington's testimony that the petitioner was "messing around" with another woman, that he contemplated killing other people, and that a complaint was pending against him before the Illinois State Bar Association. The state counters that evidence of the petitioner's alleged adulterous affair was relevant to prove motive.

Apparently the testimony was admitted on this basis. Later, when the state failed to follow up the motive issue, the judge instructed the jury that any evidence of the petitioner's immoral conduct "was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington." The Illinois Appellate Court again upheld the trial court,

> The testimony concerning the estramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plans for carrying out the conspiracy. It was presented to the jury in the context of the court of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

The same analysis applies to Weathington's testimony that at one point during the conspiracy it was contemplated that he kill two additional persons, and to Weathington's testimony that the plan had to be delayed dur to a conplaint filed with the bar association against the petitioner by the mother-in-law of the petitioner's paramour. Again, any error on the part of the trial court, dissipated as it was by giving a limiting instruction, did not negate the fundamental fairness of the trial process. The allegedly prejudicial testimony was inextricably linked to proof of the conspiracy as it developed.

Third, the trial court, erred, the petitioner asserts, in refusing to exclude taped portions of conversations between the petitioner and Weathington of the feasibility of killing other people, of potential violations by the petitioner of his clients' confidences, and of a hypothetical pregnancy of the petitioner's lover. The testimony regarding other killings is discussed above. While the remaining portions of the taped conversations preperly might have been excluded, the evidence was not material or prejudicial in a constitutional sense and was linked to the proof of conspiracy.

The petitioner next raises the point that the trial judge permitted the state to contradict its

bill of particulars through the testimony of a state trooper and later instructed the jury to disregard that evidence. The evidence was relevant to the conviction under the conspiracy counts and does not relate to the solicitation charge.

The remaining objections are trivial and do not, either when viewed individually or considered in the totality of the trial, merit federal habeas relief. While the petitioner may not have enjoyed an error-free trial at the state level, the cumulative effect of any erroneous rulings by the trial court did not deprive the petitioner of due process of law within the meaning of the Fourteenth Amendment.

WRIT DENIED.

Summary judgment in favor of the respondent and against the petitioner.

ENTER this 27th day of August, 1980.

Harold A. Baker
United States District Judge

Opinion of the District Court on Rehearing

Supplemental Memorandum Opinion and Order

Both the petitioner and the respondent have timely moved for reconsideration of the court's order of August 27, 1980. After rehearing and reconsideration the court confesses that it was error to fail to order the Writ to issue forbidding detention of the petitioner under the conviction for conspiracy. Under the rationale of Benton v. Maryland, 395 U.S. 784 (1968) disapproving the "concurrent sentence doctrine" and the principles announced in Peyton v. Rowe, 391 U.S. 54 (1967) concerning the availability of habeas corpus in cases where a consecutive sentence is challenged this court should not fail to set aside the conviction which came about through a denial of due process of law even though a valid concurrent conviction exists. Also persuasive is the discussion of potential furture harm from unconditional acts in the cases of Preiser v. Rodriguez, 411 U.S. 475 (1972) and Carafas v. LaVallee, 391 U.S. 234 (1967). See also Fiswick v. United States, 329 U.S. 211, 222 (1946) (service of sentence did not

render validity of conviction moot because of possible future consequences flowing from the invalid conviction); Sciberras v. United States, 404 F.2d 247 (10th Cir. 1968) (habeas corpus available remedy to attack concurrent sentence).

With regard to the petitioner's renewed contentions concerning the trial judge ordering the replaying of certain tape recordings that had been received in evidence the court relies on its reasons stated in the August 27, 1980 order and would add: See also United States v. DeStefano, 476 F.2d 324, 337 (7th Cir. 1973) (propriety of Allen charge upheld when jury has not indicated it was deadlocked.)

In all other respects, the court adheres to its August 27, 1980 order.

United States v. Fassoulis, 445 F.2d 13 (5th Cir. 1971) relied upon by respondent to uphold the conspiracy conviction is not in point. Fassoulis involved a one count conspiracy charge with overt acts for which convictions of substantive offenses were also obtained. Cramer had four conspiracy counts with separate overt acts charged. This court cannot determine which count or which act, including the solicitation, was the basis of the jury's general verdict in the conspiracy conviction.

It is therefore ordered that the petitioner's motion for reconsideration is allowed in part and denied in part. The respondent's motion for reconsideration is denied.

Summary judgment in favor the of the petitioner and against the respondent on the issues relating to the conspiracy conviction. Summary judgment in favor of the respondent and against the petitioner on the issues relating to the solicitation conviction.

It is further ordered that a writ of habeas corpus issue as prayed insofar, but only insofar, as the petitioner's conviction for conspiracy to commit murder is concerned. The respondent is commanded forthwith to discharge the petitioner, Larry P. Cramer, from further detention or commitment or imprisonment by reason of the conviction of the crime of conspiracy to commit murder in the Circuit Court of Champaign County, Illinois.

It is further ordered that in all other respects the petition for writ of habeas corpus is denied and the petitioner is remanded to the custody of the respondent, or his authorized representative, for further disposition in accordance with law.

ENTER this 24th day of October, 1980.

Harold A. Baker
United States District Judge

Judgment of the Court of Appeals June 30, 1982

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

Judgment of the Court of Appeals August 13, 1982

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Petitioner-Appellant, a majority of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2545

LARRY P. CRAMER,

Petitioner-Appellant,

v.

TYRONE C. FAHNER, Attorney General of the State of Illinois,

Respondent-Appellee.

No. 80-2757

TYRONE C. FAHNER, Attorney General of the State of Illinois,

Respondent and Cross-Appellant,

v.

LARRY P. CRAMER,

Petitioner and Cross-Appellee.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.
No. 79-2238—Harold A. Baker, *Judge.*

ARGUED APRIL 9, 1981—DECIDED JUNE 30, 1982

Before CUMMINGS, *Chief Judge*,* SWYGERT, *Circuit Judge*,** and HOFFMAN, *Senior District Judge*.***

HOFFMAN, *Senior District Judge*. Petitioner appeals the denial by the district court of a petition for writ of habeas corpus on his conviction in an Illinois state court for solicitation to commit murder. Respondent, State of Illinois, cross-appeals the grant of the writ on petitioner's conviction for conspiracy to commit murder. We affirm both actions on summary judgment by the lower court.

Petitioner, an Illinois attorney, was indicted on ten counts of conspiracy and solicitation, based on having planned with a former client from February to November, 1974, to have petitioner's wife murdered. Petitioner did not testify at trial; the most important evidence against him was the testimony of Weathington, the former client, and tapes of conversations between Weathington and petitioner, made after Weathington went to the police on November 18, 1974. Other prosecution witnesses included agents of the Illinois Bureau of Investigation (I.B.I.) and Patty Cozad, who testified that she accompanied Weathington on a trip to Chicago, where Weathington met petitioner and bought a knife.

After a general guilty verdict was returned on the four conspiracy and six solicitation counts, the state trial court granted petitioner's motion to dismiss the two conspiracy counts—three and ten—that were based on overt acts on December 11, after the sole co-conspirator had gone to the police, at which point the conspiracy ended

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* Circuit Judge Sprecher heard the oral argument and voted to affirm. He also had concurred in Judge Hoffman's suggested opinion but died before reviewing Judge Swygert's partial dissent. He was succeeded on the panel by Chief Judge Cummings.

** At the time of oral argument, the Honorable Luther M. Swygert was a circuit judge in active service; he assumed senior status on August 1, 1981.

*** The Honorable Walter E. Hoffman, Senior District Judge of the District of Virginia, is sitting by designation.

by law. The trial court, however, rejected petitioner's argument that the jury could have based its general verdict on the two invalid charges rather than the two alleging overt acts before November 18. The conviction was upheld by the Illinois Appellate Court. *People v. Cramer*, 64 Ill. App. 3d 688, 381 N.E.2d 827 (1978). Leave to appeal was denied by the Illinois Supreme Court on January 25, 1979 (No. 51432), and the Supreme Court of the United States denied certiorari, 444 U.S. 828 (1979).

Petitioner's collateral attack was more successful: the district court granted the writ as to the conspiracy conviction because petitioner's right to due process was violated by the possibility that the jury based its verdict on overt acts in the invalid conspiracy counts. The court initially determined that the writ should not issue because petitioner also was sentenced to a concurrent one-to-three year term for solicitation. *Cramer v. Scott*, No. 79-2238 (C.D. Ill. Aug. 27, 1980). The court, on reconsideration, agreed to issue the writ despite the existence of a valid concurrent sentence. *Id.* (C.D. Ill. Oct. 24, 1980). The State of Illinois cross-appeals the issuance of the writ as to the conspiracy conviction.

In addition to respondent's cross-appeal, this court must consider four issues raised by petitioner: (1) Was the solicitation indictment unconstitutionally vague because it merely tracked the language of the Illinois statute of "encouraging" and "requesting," rather than setting forth the very words used to solicit Weathington? (2) Did the state conceal certain evidence that would have allowed petitioner to impeach Patty Cozad, whose testimony petitioner claims was vital to the defense? (3) Was evidence of other crimes and wrongful acts by petitioner erroneously admitted and, if so, did it so prejudice petitioner as to make his trial fundamentally unfair? (4) Did the actions of the trial judge, in offering to replay and replaying tapes containing damaging evidence against petitioner many hours after the jury had twice requested the evidence, impermissibly intrude on the jury's function and coerce a guilty verdict?

VALIDITY OF CONSPIRACY CONVICTION

A. Verdict Could Have Been Based On Invalid Counts

Petitioner made two arguments to the Illinois Appellate Court, one statutory and one constitutional, as to why his conspiracy conviction should not stand, which were, respectively, that the trial court gave erroneous instruction under Illinois law and that the jury might have based its guilty verdict on the overt acts in the invalid counts. The Illinois court agreed that one conspiracy instruction was an erroneous statement of Illinois law,[1] though harmless error in light of the overwhelming evidence of guilt, but failed to address the constitutional issue. The federal court, however, upon consideration of the constitutional argument, determined that petitioner's due process rights were violated because the jury's general verdict could have been based on the invalid counts later dismissed. We agree that, because we are unable to tell whether the jury based its verdict on the valid or invalid counts, the general conspiracy conviction was unconstitutional. Where a verdict is supportable on one ground but not another, and it is impossible to tell which grounds the jury selected, the conviction is unconstitutional. *Stromberg v. California*, 283 U.S. 359, 368 (1931). Respondent distinguishes the invalidation of the conviction in *Stromberg* as being grounded on the fact that one of the three possible bases for conviction under

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[1] Illinois Pattern Instruction Criminal No. 6.04 only requires proof "[t]hat an act in furtherance" was performed, whereas the statute itself requires that an act in furtherance be alleged and proved, which the Illinois majority saw as meaning that the same act that was alleged in the indictment must be proved. *Cramer*, *supra*, at 833. Respondent reargued that issue, already disposed of by the Illinois court, on this appeal, relying principally on cases interpreting the federal conspiracy statute as not requiring proof of the same overt act alleged in the indictment. Not only is respondent's reliance on the inapposite federal cases misplaced, but we will not disturb the Illinois Appellate Court's interpretation of its own state law.

the statute was *unconstitutional*, whereas here two possible bases for conviction were merely invalid. It is true that in *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942), just as in *Stromberg*, one of the two theories under which the case was submitted to the jury was unconstitutional and therefore the judgment could not be sustained. However, in *Yates v. United States*, 354 U.S. 298 (1957), the ground on which the verdict could have rested, for which it was set aside, was legally invalid rather than unconstitutional. A general guilty verdict was returned based on violation of a statute that forbad advocating the violent overthrow of the government or organizing the Communist Party. The conviction was set aside, not because one of the prohibitions was unconstitutional, but because the three-year statute of limitations had run on the organizing charge, since the Party was first organized in this country in 1945. Given the lack of clarity in the jury instructions, the Court wrote, "we have no way of knowing whether the overt act found by the jury was one it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy." Similarly, this conspiracy conviction must be set aside. *Id.* at 311-12.

B. Inapplicability Of Concurrent Sentence Doctrine

We likewise uphold Judge Baker's decision to issue the writ as to the conspiracy conviction, despite the existence of a valid concurrent sentence on the solicitation conviction, for the reasons he set out in his supplemental opinion and order: the principles behind the availability of habeas for consecutive sentences, one of which is scheduled to be served in the future, as set out in *Peyton v. Rowe*, 391 U.S. 54 (1968); the disapproval of the so-called "concurrent sentence" doctrine in *Benton v. Maryland*, 395 U.S. 784, 787-93 (1969); and the availability of habeas corpus even after a sentence is served to avoid future consequences from an invalid conviction, as explained in *United States v. Fiswick*, 329 U.S. 211, 222 (1946). The circuits have gone both ways in examining

the continuing validity of the "concurrent sentence" doctrine. *Compare Sciberras v. United States*, 404 F.2d 247, 249-50 (10th Cir. 1968) (Habeas remedy is available to attack a concurrent sentence), with *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *Van Geldern v. Field*, 498 F.2d 400, 403-04 (9th Cir. 1974); *United States ex rel. Weems v. Follette*, 414 F.2d 417, 418-19 (2d Cir. 1969), *cert. denied*, 397 U.S. 950 (1970) (The continuing validity of the "concurrent sentence" doctrine was upheld).

The Supreme Court has explained that the concurrent sentence doctrine "cannot be taken to state a jurisdictional rule", *Benton, supra*, at 790, based on lack of a justiciable case or controversy, although it "may have some continuing validity as a rule of judicial convenience," *id.* at 791, holding merely that "there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed," *id.* The Court implied that a habeas court may consider constitutional attack on one conviction, even though a petitioner is serving a concurrent sentence on a valid second conviction, if there is a possibility of adverse collateral consequences from the existence of the invalid conviction, *id.* at 790-91, but, because the state court did not apply the doctrine, the Supreme Court found it "unnecessary to resolve [the] dispute" as to whether "the concurrent sentence doctrine survives as a rule of judicial convenience". *Id.* at 792.

Essentially, the state of the law now is that it is in the discretion of the habeas court whether it will examine the validity of one conviction, despite a valid second conviction for which petitioner is serving a concurrent sentence, or refuse to pass on the constitutionality of the conviction, based on the court's assessment of the collateral effect of the conviction. "The proper exercise of this discretion depends upon the degree of prejudice that may be attributed to the challenged conviction." *Van Geldern, supra*, at 403. The Fourth Circuit sees the application of the concurrent sentence rule, after *Benton*, as "restricted to situations where there is no substantial

possibility that the unreviewed conviction will adversely affect the defendant's right to parole or expose him to a substantial risk of adverse collateral consequences." *Truong Dinh Hung, supra*, at 931.[2]

Judge Baker did not specifically set out in his supplemental opinion whether he reconsidered and ordered the writ to issue because of the danger of collateral consequences to petitioner, but we read his reliance on "the rationale of *Benton v. Maryland* . . . disapproving the 'concurrent sentence doctrine' . . ." as indicating that he followed the *Benton* principle of looking to the possibility of consequences flowing from a second conviction. We therefore uphold his discretionary grant of the writ to avoid the collateral effects of a second conviction.

SOLICITATION COUNTS

Petitioner's fourfold attack on his solicitations conviction, to be successful, must go beyond merely proving that the alleged trial errors violated Illinois' own law and procedural rules and show that the errors rose to the constitutional level, either by making his trial so fundamentally unfair as to deny him due process or by abridging a specific constitutional guarantee, such as the right to notice of the charges against him, which is violated by a constitutionally vague indictment. *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1222-23 (7th Cir. 1974), *appeal after remand*, 538 F.2d 151 (1976) (en banc), *cert. denied*, 429 U.S. 1102 (1977).

Petitioner's first attack on his conviction is aimed at the six solicitation counts which he claims were unconstitutionally vague for failure to include the very words

[2] Judge Winter, writing for the majority on all other issues, was in the minority in disapproving the "concurrent sentence" doctrine. *Id.* at 922-23. He insisted that Judge Russell's dissent, *id.* at 931-32, in which Judge Hall concurred, was in direct contradiction to an earlier Fourth Circuit opinion granting the writ where a valid concurrent sentence existed, *Close v. United States*, 450 F.2d 152, 155 (4th Cir. 1971), *cert. denied*, 405 U.S. 1068 (1972).

or the substance of the words used to solicit Weathington to murder petitioner's wife. The indictment tracked the language of the Illinois statute: petitioner was accused of encouraging and requesting Weathington to murder his wife. Petitioner contends that because Illinois demands that a perjury indictment set out the operative words, *People v. Aud*, 511 Ill. 2d 368, 288 N.E. 2d 453 (1972), the same should hold true for solicitation, the essence of which he claims is also the words spoken. But Illinois itself has twice upheld solicitation indictments stated in the language of the statute. *People v. Powell*, 72 Ill.2d 50, 377 N.E.2d 803 (1978), *cert. denied*, 440 U.S. 907 (1979); *People v. George*, 67 Ill. App. 3d 102, 384 N.E. 2d 377 (1978). Even if the Illinois court was wrong in making this distinction under Illinois law, it is not our role on habeas corpus to set aside a state court's interpretation of its own law. *United States ex rel. Burnett v. People of Illinois*, 619 F.2d 668, 671 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980). Petitioner attempts to distinguish those two cases by the fact that the solicitation here was based on conversations that took place over a nine-month period, but that is all the more reason for not demanding that the State set out the very words used to solicit. The offense of perjury is readily distinguishable from solicitation; the former is directed to a fixed statement, the latter at times to an entire conversation. With perjury, the only issue is whether or not it is true; solicitation, on the other hand, may be based on lengthy detailed conversations, some of which may be direct but many portions of which may consist of subtle, indirect inducements, the words of which are meaningless when taken out of context.

Illinois' requirements for an indictment are that it (1) apprise the defendant with reasonable certainty of the nature of the offense in order to allow him to prepare a defense; (2) include the elements of the offense; and (3) sufficiently identify the particular offense committed so as to protect defendant from double jeopardy. *George*, *supra*; *see also, Powell*, *supra*.

As the District Court here pointed out, "It has been uniformly held by [the Supreme] Court that the suffi-

ciency of an indictment cannot be reviewed in habeas corpus proceedings," *Knewel v. Egan*, 268 U.S. 442 (1925). Relief should only be granted where the indictment is "so fatally defective that under no circumstances could a valid conviction result from facts provable under the indictment." *Johnson v. Beto*, 383 F.2d 197, 198 (5th Cir.), *cert. denied*, 393 U.S. 868 (1968). Such a statement cannot be made of the solicitation counts against petitioner.

CONCEALMENT OF WITNESS INFORMATION

Petitioner next argues that the prosecution concealed impeachment information about Patty Cozad, whom he views as a key prosecution witness, and thus denied him his right to confront the witness against him. Whether the trial court violated Illinois' procedural rules about revealing such information is not an issue on habeas corpus; we need only determine whether the state denied petitioner due process by concealing evidence that was "material" in a constitutional sense.

We reject respondent's first two defenses—that the accused did not make a specific request for impeachment material against Cozad and that the prosecution itself was not aware of any material the police had that could have been used to impeach Patty Cozad. For purposes of determining the prosecution's duty to reveal material favorable to an accused under *Brady v. Maryland*, 373 U.S. 83 (1963), "it is not fatal to petitioner's contention that his attorney made no request for the testimony", and knowledge of the police should be imputed to the prosecution. *Clarke v. Burke*, 440 F.2d 853, 855 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). However, where, as here, there is no knowing use of false evidence by the prosecution, petitioner must show a substantially higher probability that disclosure would have altered the result. *Id.* That is, absent "active misconduct on the part of the prosecution, the 'suppressed' evidence must be 'vital and material' to furnish grounds for the reversal of a conviction." *Id.*

The petitioner's allegation is that the state concealed Patty Cozad's address, real name, use of narcotics, and

pending state charges against her for a narcotics sale to the chief investigator in petitioner's case. Even if this information would have served to impeach Patty Cozad's testimony, that testimony was not vital to the state's case. Her testimony merely served to corroborate Weathington's claim to have been in Chicago on September 26 and 27, 1974, at the same time petitioner was at the Palmer House in that city with his wife for a legal meeting. Cozad testified that she accompanied Weathington to Chicago on those dates and knew what he did and where he went on those dates, including a trip to buy a knife, one of the overt acts alleged in the indictment. We agree with the district court that, because she "was not an eye-witness to the alleged solicitation or to any concerted activity between the petitioner and Weathington and gave no testimony as to those events," her testimony was "cumulative and tangential."

The standard for what is "material" in a constitutional sense was set out by the Supreme Court in the leading case of *United States v. Agurs*, 427 U.S. 97, 109-110 (1976): "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." The omitted evidence must create "a reasonable doubt that did not otherwise exist," evaluated "in the context of the entire record." *Id.* at 112. If, eliminating the additional evidence, there is still no reasonable doubt of guilt, the trial was fair and the writ should not issue. *Id.* at 112-13. It would be "far too restrictive on the state[s]" for a habeas court to vacate a state conviction simply because suppressed evidence, such as a police report, "*might* have led the jury to entertain a reasonable doubt as to his guilt." *Ross v. State of Texas*, 474 F.2d 1150, 1152-53 (5th Cir.), *cert. denied*, 414 U.S. 850 (1973). *See also United States ex rel. Moore v. Brierton*, 560 F.2d 288, 292 (7th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978) (Where a demand is not made or is made in general terms, such as for all statements from all witnesses to the police or all probation reports on 14 people, the standard is whether the evidence creates a reasonable doubt that did not otherwise exist, evaluated in the light of the entire record).

Because no reasonable doubt exists of petitioner's guilt even without Patty Cozad's testimony, the failure to reveal information that might have been used to impeach her was not a deprivation of petitioner's constitutional rights.

ERRONEOUSLY ADMITTED EVIDENCE

Petitioner protests the admission of evidence that he had used marijuana, committed adultery, had bar association complaints filed against him, and solicited the murder of other people. The evidence came up in Weathington's direct testimony, on the tapes, and on cross-examination of Mrs. Cramer.

On habeas, mere failures to observe Illinois evidentiary rules, without more, will not occasion the issuance of a writ. However, petitioner's claim is that the cumulative effect of the allegedly erroneous rulings was so prejudicial that it created a danger that he was convicted for those other acts, rather than for the crimes for which he was on trial. Evidence of other wrongs is admissible under Illinois law if relevant to an issue other than character or propensity to commit the crime charged. The Illinois Appellate Court found the evidence of marijuana, adultery, and bar association complaints relevant to the developing course of conspiracy, a conclusion with which the federal habeas court agreed.

Weathington's testimony on marijuana was that he went to the office of petitioner, his former attorney, to request a $20 loan. When asked what collateral he had, he said, he handed over the marijuana, whereupon petitioner smoked some in his pipe. Reasoning that Illinois allows some latitute in proof of the *relationship* of co-conspirators and the purpose of the conspiracy, *People v. Billburg*, 314 Ill. 182 (1924), the trial court admitted the evidence. We agree with what the Illinois Appellate Court wrote in upholding that admission, *Cramer*, *supra*, at 832:

> The evidence at issue here was clearly intertwined with the negotiation and progress of the conspiracy. It did not concern wholly independent and unre-

> lated conduct clearly apart from the offenses charged. The transaction concerning a loan 'secured' by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington would be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

The adultery, bar complaints, and solicitation of other murders came up in Weathington's testimony when he quoted petitioner as saying that he could not press forward at that time with the plans to kill his wife because of pressure he was under from another quarter. Weathington's version of what petitioner told him was that petitioner had had an affair with the wife of a client and the woman's mother-in-law, upon learning of the liaison, complained to the bar association. At one point petitioner said that he might need to order two more murders if the woman continued to press the complaints. The prosecution told the trial judge that adultery was relevant to show petitioner's motive to solicit murder. Although the prosecution failed later to make the tie between adultery and motive, we agree with the view of the Illinois Appellate Court that the adultery evidence was nevertheless admissible as relevant to the *delay* in carrying out petitioner's plan:

> The testimony concerning the extramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plan for carrying out the conspiracy. It was presented to the jury in the context of the course of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

Id. In like manner, the bar association complaints were part of petitioner's explanation to Weathington of the delay in the plans, and the petitioner's mention of other killings was part of his explanation to Weathington at the time as to how he would deal with the adultery and

bar complaint problems. In addition, the killings came up in the context of a discussion of a possible hit man to kill Mrs. Cramer.

Petitioner's argument that references to these acts should have been excised from the above-described tapes analogizes to the rule requiring deletion of references to other crimes from a confession introduced at trial. *Cf. United States ex rel. Floyd v. Williams*, 367 F.2d 990 (2d Cir. 1966) (Where judge gave no curative instruction, unedited confession's admission was error). There is, however, a practical difference between the two: whereas a written confession can be cut without harming its logic or continuity, excisions from tapes of conversations will often render them disjointed and meaningless.

The trial court should not have allowed prolonged questioning on cross-examination of petitioner's wife on her knowledge of petitioner's adultery and bar association problems, which the trial judge belatedly stopped after her repeated protests of ignorance. For three reasons, however, we do not find that error to present the occasion for the issuance of a writ. First, the judge's limiting instructions at the close of the prosecution's case-in-chief that "any evidence received in regards to the use of marijuana or immoral conduct was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington," and his instructions after closing arguments for the jury to consider such evidence only for the limited purposes for which it was allowed effectively cured any prejudice from erroneously admitted evidence.[3] Proper instruc-

[3] Petitioner argued that the instructions should have been given at the moment the allegedly inadmissible evidence was given. We do not necessarily agree with the Illinois court's answer to that argument that "orally instructing at the close of all prosecution evidence would more effectively impress than rulings scattered throughout several days of testimony." *Id.* However, the cases we cite, *see* textual discussion *infra*, make clear that proper instructions, given at the time the evidence is admitted or later, are usually effective.

tions will usually suffice to correct damage from any erroneously admitted evidence or evidence admissible only for a limited purpose. *United States v. Castaldi*, 453 F.2d 506, 511-12, (7th Cir. 1971), *cert. denied*, 405 U.S. 992 (1972); *United States v. Teller*, 412 F.2d 374, 380 (7th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971). *See also, United States v. Quinn*, 398 F.2d 298, 303 (7th Cir.), *cert. denied*, 393 U.S. 983 (1968).

The second reason for not granting a writ for any errors in admitting this evidence is the limitation on the role of a federal habeas court in examining such errors. A habeas court should not invalidate a state conviction unless the erroneously admitted evidence so tainted the trial that it was fundamentally unfair. Although the trial was not conducted particularly well at the state level, we do not believe petitioner was denied due process. It is not the role of a federal habeas court to correct state-court errors; the state's administration should not be interfered with unless a federal right is violated. *McGee v. Eyman*, 310 F.2d 230, 232 (9th Cir.), *motion to file petition for writ denied*, 371 U.S. 917 (1962). Unless the claimed error amounted to a fundamental defect so great that it inherently resulted in a complete miscarriage of justice, the conviction should stand. *Jackson v. Hutto*, 508 F.2d 890, 891 (8th Cir. 1975). State evidentiary rulings should rarely be the cause of habeas review. *Buder v. Bell*, 306 F. 2d 71, 75-76 (6th Cir. 1962) (Admission of evidence is "peculiarly within the province of the trial judge," who has "wide latitude and discretion in such matters" and errors that would warrant reversal on direct appeal should "rarely . . . warrant a collateral attack on a judgment of conviction as being a denial of due process of law."). *Accord, Maggitt v. Wyrick*, 533 F.2d 383, 385 (8th Cir.), *cert. denied*, 429 U.S. 898 (1976); *United States ex rel. Choice v. Brierley*, 460 F.2d 68, 70-71 (3d Cir. 1972); *Walle v. Sigler*, 456 F.2d 1153, 1155-56 (8th Cir. 1972); *United States ex rel. Holliday v. Adams*, 443 F.2d 7 (2d Cir. 1971). *See also Spencer v. Texas*, 385 U.S. 554, 564 (1967).

Erroneous evidentiary rulings will not cause a writ to issue unless a specific constitutional guarantee has been

violated, which is not claimed by petitioner here, or the error is of such magnitude that the result is a denial of fundamental fairness. *United States ex rel. Clark v. Fike*, 538 F.2d 750, 757 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *accord, United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1222 (7th Cir. 1974), *appeal after remand*, 538 F.2d 151 (1976) (*en banc*), *cert. denied*, 429 U.S. 1102 (1977); *United States ex rel. Harris v. State of Illinois*, 457 F.2d 191, 198 (7th Cir.) *cert. denied*, 409 U.S. 860 (1972). The Fifth Circuit's standard for judging a constitutional error of a state in admitting prejudicial evidence is whether it is "material in the sense of a crucial, critical, highly significant factor [in the outcome of the case]." *Lawrence v. Wainwright*, 445 F.2d 281, 282 (5th Cir. 1971) (*citing Luna v. Beto*, 395 F.2d 35, 41 (5th Cir. 1968) (*en banc*), (Brown, Chief Judge, concurring specially, in which 7 judges joined), *cert. denied*, 394 U.S. 966 (1969)). *Accord, Anderson v. Maggio*, 555 F.2d 447, 451 (5th Cir. 1977). By that standard, the other crimes and wrongs here were not material. As the district judge wrote: "While petitioner may not have enjoyed an error-free trial at the state level, the cumulative effect of the erroneous rulings by the trial court did not deprive the petitioner of due process of law within the meaning of the Fourteenth Amendment."

Closely tied to the test of a denial of fundamental fairness is the third factor in our decision to uphold the denial of the writ: the strength of the evidence against petitioner makes any such error here harmless beyond a reasonable doubt. Where the evidence of guilt "while clearly sufficient" is "not exceedingly strong," there may be "a reasonable possibility that the error might have contributed to the conviction." *United States ex rel. Smith v. Rowe*, 618 F.2d 1204, 1213 (7th Cir.), *vacated and remanded on other grounds*, 449 U.S. 810 (1980). However, where, as here, the evidence of guilt is so strong that, even without the admission of the disputed evidence, the state proved its case against the petitioner beyond a reasonable doubt, the writ should not issue. *Compare United States ex rel. Ross v. LaVallee*, 448 F.2d 552, 554 (2d Cir. 1971) (Erroneously admitted

statement of co-defendant was harmless due to "overwhelming independent evidence against petitioner . . . ."); *Subilosky v. Moore*, 443 F.2d 334, 336 (1st Cir.), *cert. denied*, 404 U.S. 958 (1971) (Admission of prior invalid convictions to impeach defendant harmless error in view of "relative insignificance" of evidence and "persuasiveness of the other evidence."); *United States ex rel. Gaines v. Randle*, 435 F.2d 700, 701 (3d Cir. 1970) (Habeas relief was denied due to other "strong affirmative evidence" of guilt and the fact that the illegally seized evidence "contributed nothing material to the case against him."); *United States v. Garrison*, 280 F.2d 493, 499 (7th Cir. 1960) (Improper question to defendant not reversible error in light of jury instructions to disregard the question and the "clear and convincing" evidence of guilt), with *Potts v. Estelle*, 529 F.2d 450, 455 (5th Cir. 1976) (It was not harmless error to admit evidence of nine uncounseled misdemeanor convictions of defendant where the effectiveness of his testimony hinged largely on the jury's assessment of his credibility and the improper evidence went directly to that credibility.); *Favre v. Henderson*, 464 F.2d 359, 366 (5th Cir.), *cert. denied*, 409 U.S. 942 (1972) (Erroneous admission of police testimony about informants' reports where defendant was denied the right to confront the informants as witnesses against him, was not harmless error because, "[w]ithout the disputed testimony, the prosecution had a questionable case, ...").

COERCION OF JURY BY REPLAYING TAPES

The most troublesome question raised by petitioner is whether the judge impermissibly intruded on the jury's function and coerced the jury into a guilty verdict by offering to replay and replaying tapes of incriminating conversations, some twenty hours after he had turned down two jury requests, the first for transcripts of those tapes and the second for a machine to play the tapes themselves.

The jury retired to deliberate on April 15 at 1 P.M. Some three hours later they sent a request to the judge for an Illinois road map and the transcript of certain

tapes. Without notifying counsel, the court sent word to the jury that these items were not in evidence, as indeed they were not, although the content of the tapes had been played to the jury. It was within the judge's discretion to deny the jury the transcripts.[4] *United States v. Toney*, 440 F.2d 590, 591-592 (6th Cir. 1971); *see also United States v. Braverman*, 522 F.2d 218, 224 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975) (It was within the judge's discretion to have a tape of all instructions replayed in response to a jury inquiry and to allow the jurors to take notes while the tape was played.) Although a trial judge should consult with counsel before denying a request and give the answer in open court, a judge's refusal to grant a jury request for further instructions does not constitute impermissible "communication between the judge and the jury." *Miller v. Pate*, 300 F.2d 414, 42[illegible] (7th Cir. 1962), *cert. denied*, 371 U.S. 898 (1963). Therefore, although a judge should consult with counsel first, it is not a denial of due process to turn down *ex parte* a jury request for further instructions. *Accord, United States v. Medansky*, 486 F.2d 807, 816 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974) (It was harmless error for judge to enter jury room, without objection of the attorneys, to explain his denial of transcripts to the jury and, in answer to a juror's query, state that the transcript was of a prior trial); *United States v. Di Pietto*, 396 F.2d 283, 287 (7th Cir. 1968), *vacated and remanded on other grounds*, 394 U.S. 310 (1969) (Not reversible error for judge, when informed jury was unable to reach a verdict, to send *ex parte* communication to jury to keep deliberating); *Estes v. United States*, 335 F.2d 609 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965) (Additional written charges to jury should have been given in open court, but failure to do

[4] In *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 697 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978), it was not coercive for the judge to ignore a jury message at 10:25 P.M. that the jury could not reach a verdict and wished to be bedded for the night. The jury brought in a verdict of guilty the next morning at 3:22 A.M., after having deliberated through the night.

so was not reversible error). *Compare United States v. Clavey*, 565 F.2d 111, 118-20 (7th Cir. 1977), *aff'd. on rehearing*, 578 F.2d 1219 (*en banc*) (*per curiam*), *cert. denied*, 439 U.S. 954 (1978) (Despite this circuit's disapproval, under Federal Rule of Criminal Procedure 43, of trial court's failure to notify counsel of jury inquiries and its refusal to answer those requests, such error was harmless). *Compare United States ex rel. Tobe v. Bensinger*, 492 F.2d 232, 238-39 (7th Cir. 1974) (Although communications between jury and court or third person, such bailiff, "outside the presence of the defendant and his counsel are presumptively prejudicial," if "the communications were harmless or lacked prejudice," the writ will not issue; statements in nature of an *Allen* charge by bailiff telling jurors they had to keep deliberating and reach a decision had "a coercive effect resulting in prejudice to the defendant where they [were] void of such an admonition" that "no juror should relinquish his conscientiously held convictions to join in the majority verdict" because "any influence which emphasizes the importance of agreement to the exclusion of the dictates of conscience is coercive and prejudicial."); *and United States v. Dellinger*, 472 F.2d 340, 378-80 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (Generally communications to jury from judge should be in open court, although *ex parte* messages denying transcripts or to keep deliberating have been harmless in other cases, but error was not harmless where matter was not brought to counsel's attention until months later in an article on the "Chicago Seven", there was evidence the verdict might have been a compromise, and the marshal was said to have told the jury that "the jury might be sequestered for a substantial further period before the judge would accept the fact of a hung jury.").

Sometime after the judge had denied the transcripts, the jury requested a tape recorder and the tapes, a request which, according to at least one circuit, he could have granted. *Hamilton v. United States*, 433 F.2d 526, 530 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 944 (1971). However, the trial court, after consulting with counsel, determined to deny the request. The federal habeas court's statement that the trial judge denied the request

"for reasons unrelated to the propriety of the request" is not altogether correct. At the time he denied the request, the judge pointed out not only that the jury might damage the tapes or accidentally erase a portion but also that the jury had heard the material on the tapes sufficiently at trial and during closing argument. Both sides agree that it was within the sound discretion of the trial judge to deny the request, whichever was his primary reason for doing so.[5]

In hindsight, it is obvious that if the judge's only concern was the jury's inability to operate the machine without damaging the tapes, he should have told the jury immediately that it could return to open court to have the tapes replayed.[6] Instead, he did not offer the jury that option until much later, after it had deliberated a total of twenty hours (without discounting dinner and lunch time for two days), at which point he called in counsel to announce his intentions. He told them he intended to recall the jurors, inquire if they were making progress, and, if the answer was no, ask if replaying the tapes would be helpful. He gave no indication what he would do if the foreman said they *were* making progress, which in fact is what he did answer. At that juncture, the judge asked the foreman, and each juror in turn, "Would it help, in your opinion, in this case if you were to hear the tapes played here in the courtroom?"

When each answered in the affirmative, he directed that the tapes be replayed, after which the jury resumed

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[5] At least one circuit has held that it was not reversible error for the judge to allow an F.B.I. agent who was a witness for the prosecution to replay the tapes for the jury in closed Court with the presence of counsel for defendant, rather than with defendant present in open court, although it said it would not condone such practice in the future. *United States v. Florea*, 541 F.2d 568, 570-72 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

[6] The content of the tapes, while introduced primarily in support of the two conspiracy counts that were later thrown out, was also corroborative of an overt act committed prior to Weathington's collaboration with the police.

deliberations for 45 minutes before bringing in a verdict of guilty of conspiracy and solicitation.

Petitioner seems to argue that the judge's replaying of the tapes was not the delayed grant of a jury request that he had initially denied but was the selection by the judge of certain evidence to highlight, which intruded impermissibly on the jury's function. We do not accept that reading of the situation. In our opinion, that very material had been requested twice by the jury. The state appellate majority did not address the issue, as the justice who wrote the opinion dissented on that point. He stated he believed that the trial judge, by replaying the tapes, implied to the jury that he considered that evidence to be critically important. He said that the court abused its discretion by volunteering the evidence to the jury and thus directing its attention to that evidence. We disagree with the state court dissent. In our opinion the trial judge did not direct the jury's attention to material *he* selected but merely replayed for the jury the very material the *jury itself* had selected and twice requested hearing. The Second Circuit has gone so far as to allow a judge to add evidence to a jury request, which the judge did not do here:[7]

> [R]eversal for submitting material in addition to that requested is required only where the submission might indicate, or be fairly taken by the jury to indicate, prejudice of the judge against the defendant, as, e.g., when the judge insisted on submitting evidence favorable to the prosecution that was in no way germane to the request, or when it leads to biasing of the record.

United States v. Gentile, 525 F.2d 252, 261 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). That court cited with approval the ABA Standards Relating to the Ad-

[7] This circuit has held that a judge can add to the instructions he is requested by the jury to reread or reread all the instructions if he feels such is necessary to avoid confusing or misleading the jury. *United States v. Castenada*, 555 F.2d 605, 611-12 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977).

ministration of Criminal Justice, Trial by Jury § 5.2(b) (1968).[8]

We see the only valid issue, then, as *not* whether the judge impermissibly focused the jury's attention on evidence in which it had shown no interest,[9] but whether, by delaying so long in granting the request, the judge had lost the discretion to grant the request that he admittedly had at the moment it was first made. The petitioner's second argument as to the delay—that the belated replaying had a coercive effect on the jury because it had passed the point of needing to rehear that evidence—is, in our opinion, less persuasive. Not only is it based on pure surmise, but it is belied by the jurors' unanimous affirmative responses to the judge's query as to whether replaying the tapes would be helpful.

It is true that "[c]ommunications between judge and jury must be handled with particular care . . ." *United States v. Peskin*, 527 F.2d 71, 85 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976) (It was not coercive for the judge to ask the jurors if they thought they could reach a verdict if he gave them one-half hour more, at least

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[8] The Standard, as quoted by the Second Circuit, provides that the judge *must* grant a jury request to review specific evidence and *may*, in its discretion add "other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested." *Id.* at 260-61.

[9] We find the two major cases relied on by petitioner to be inapposite. In *People v. Baltimore*, 7 Ill. App. 3d 633, 288 N.E. 2d 659 (1972), the judge asked the deadlocked jury in a murder case whether it could reach a verdict without regard to the death sentence. Unlike the present case, the judge's remark was coercive in that it could have indicated to the jury that the judge believed the defendant was guilty and it was not made in answer to a jury request. Likewise, the judge's statement in *People v. Golub*, 333 Ill. 554, 165 N.E. 196 (1920) was coercive: when the jury reported itself deadlocked, he said that they should have no trouble reaching a verdict on that evidence, which could have been taken by the jury to mean that the defendant was clearly guilty in the judge's opinion.

absent an objection by defendant at the time.). Two cases from this circuit are helpful on the issue of whether the timing of the judge's communication to the jury about replaying the tape made it coercive. One, cited by the federal habeas court, deals with whether, when there is a lack of deadlock, the *Allen* charge is warranted; by analogy it provides some precedent for holding that repeating evidence or instructions to a non-deadlocked jury is not *per se* coercive. In *United States v. DeStefano*, 476 F.2d 324 (7th Cir. 1973), defendant argued that giving the *Allen* charge to a jury that had given no indication of deadlock was coercive. This court rejected that argument, distinguishing a Ninth Circuit case that bolstered DeStefano's contention, *United States v. Contreras*, 463 F.2d 773 (9th Cir. 1972), because the jury in *Contreras*, by asking for further instructions, had shown confusion about the law rather than an inability to reach a verdict. *DeStefano*, *supra*, at 337. This Court found that the timing of the charge was not only *not* coercive *per se* but was not "a violation of the ABA Standards," which state that a court can give the *Allen* charge "[i]f it appears to the court that the jury has been unable to agree, ..." *Id.* at 336-37. In contrast to the jury in *Contreras*, the *DeStefano* jury, by not yet announcing a deadlock, had not shown an inability to reach a verdict. Indeed, the *DeStefano* court found that the *Allen* charge was *less* coercive because the jury had not yet announced to the court that it was deadlocked.

> Furthermore, the fact that the jury did not indicate that it was deadlocked before the instruction was given may actually be taken as evidence that the charge was not coercive, since under such circumstances dissenting jurors would be less likely to believe that the trial judge was trying to shake their decision.

Id. at 337. *Accord*, *United States v. Munroe*, 424 F.2d 243, 247 (10th Cir. 1970) (*Allen* charge, although verdict followed 40 minutes later, was not coercive where jury was making progress when charge was given). Following the reasoning of *DeStefano*, the fact that the jury

that found petitioner guilty here had announced that it was making progress was one factor tending to show *lack of coercion* from the replaying of the tapes; a non-deadlocked jury is less susceptible to such coercion.

It is true that the court in *DeStefano* also cited the four-hour delay in verdict after the *Allen* charge as a factor in determining lack of coercion. *DeStefano*, *supra*, at 337. *Accord*, *United States v. Bambulas*, 471 F.2d 501, 506 (7th Cir. 1972) (Four hours' deliberation after *Allen* charge was a factor in determining lack of coercion.) Although the jury here reached a verdict after forty-five minutes, it had already deliberated twenty hours when the tapes were replayed and could have been on the verge of a verdict at any rate; the foreman had announced they were making progress. The ABA Standards, *supra*, Commentary to §5.4(b) at 154, and some courts consider shortness of time in reaching a verdict after an *Allen* charge as irrelevant to whether the charge was coercive when given, *e.g.*, *United States v. Giacalone*, 588 F.2d 1158, 1167-68 (6th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). Still others have found no coercion even where the verdict was returned in a very short time after the charge was given, *e.g.*, *United States v. Betancourt*, 427 F.2d 851 (5th Cir. 1970) (Just under two hours); *United States v. Hynes*, 424 F.2d 754 (2nd Cir.), *cert. denied*, 399 U.S. 933 (1970) (Five minutes). This court has upheld a verdict as noncoercive that was rendered only twenty minutes after a polling showed eleven of twelve jurors reported deadlocked and an hour after an earlier *Allen* charge where the jury had deliberated almost thirteen hours before the *Allen* charge was given. *United States ex rel. Anthony v. Sielaff*, 552 F.2d 588 (7th Cir. 1977). Considering the danger inherent in the so-called dynamite charge, as opposed to merely rehearing evidence already heard, the time lapse before verdict here does not indicate coercion.

Another Seventh Circuit case, not cited by either side, is even more helpful on the issue of whether the timing of the judge's belated offer to comply with the jury's

request was coercive.[10] Petitioner, in *United States v. Quintana*, 508 F.2d 867, 878 (7th Cir. 1975), protested "the alleged failure of the trial judge to make a prompt response to the jury's request for a definition of the words 'entrapment' and 'coercion'." The jury request, involving the defendant's principal defenses, was made about 6 p.m. one day, six hours after beginning its deliberations. Upon receiving word from the marshal that the judge wished them to keep deliberating until they heard from him, they continued until 10:15 p.m. Although they resumed deliberations at 9 a.m. the next morning, they were not re-read the key instructions until 10:30 a.m. *Twenty minutes later*, the jury reached a verdict. This court wrote:

> [Petitioner] does not complain that the instructions given were incorrect, but rather that allowing the jury to remain in some confusion on those defenses for five hours of deliberation was prejudicial error where entrapment and coercion were the principal grounds of his defense. . . .
>
> The ultimate test is whether the procedure as a whole was so likely to have confused the jury that reversal is required. . . . We hold that it was not. . . . [T]he jury was not under great pressure to terminate its deliberations. After the jury heard the supplemental instructions the jurors continued to deliberate for twenty minutes. The verdict they

[10] Respondent primarily relies on *People v. Reynolds*, 57 Ill. App. 3d 593, 373 N.E.2d 650 (1978) on this issue. In *Reynolds* one juror could not reach a verdict without review of certain testimony, but the court, believing that such would involve too much time, refused the foreman's request. Shortly thereafter, upon reconsideration, the judge asked that the juror narrow the request to the specific testimony desired and then had the reporter read back the identification testimony of the police officers that was specified, while refusing defendant's request that it be put in context by a rereading of the cross-examination of the officers. However, the delay in granting the request in *Reynolds* was minimal next to the time lag in acceding to the jury's request in the instant case.

> reached was consistent with the overwhelming weight of the evidence.

Id. at 878. We do not believe that the petitioner has carried his burden of showing that the judge's belated grant of the jury's request for the tapes, even if unwisely delayed, so confused the jury or intruded on its function as to deny petitioner due process and require that his conviction be vacated.

We therefore affirm the grant of the writ as to the conspiracy conviction and the denial of the writ as to the solicitation conviction.

AFFIRMED.

SWYGERT, *Senior Circuit Judge*, concurring in part and dissenting in part. I respectfully dissent from the majority's holding that the replaying of certain tapes for the jurors during their deliberations did not deny petitioner a fair trial. I believe that the judge's actions interrupting the jury's deliberations so prejudiced petitioner as to violate his constitutional right to a fair trial by an impartial jury.

Prior to sending the jury out to deliberate, the trial judge determined that he would not allow tapes of conversations between petitioner and a key prosecution witness played into evidence at the trial to be taken into the jury room during deliberations. About two hours into deliberations, the jury sent a message to the judge asking for a road map and a transcript of the tapes. The judge denied the request, without informing counsel, because neither item was in evidence. The jurors then asked that the tapes and a tape recorder be sent in. The judge discussed the question with the attorneys for both sides, then denied the request on the grounds that the jurors might accidentally damage the tapes and that the jurors had heard the tapes enough during the trial.

The jury deliberated for the rest of that day and part of the next when the trial judge informed the attorneys that he was going to call the jury back into court to ask

if they were making progress and if not, to ask whether hearing the tapes again would help them arrive at a verdict. Counsel for petitioner objected, contending that replaying the tapes at that time would place prejudicial emphasis on that evidence. Despite this objection, the judge had the jury brought back into the courtroom and asked the foreman if the jury was making progress in its deliberations, to which the foreman answered in the affirmative. The trial judge nevertheless asked each juror if it would help them to hear the tapes again, and each juror said yes. The tapes were then played for the jury over petitioner's objections. The jury retired to the jury room for forty-five minutes before returning a guilty verdict.

Errors of the trial court will not be reviewed by a federal court considering a petition for habeas corpus unless those errors amount to a constitutional violation. *See Scalf v. Bennet*, 408 F.2d 325, 327 (8th Cir. 1969), *cert. denied*, 396 U.S. 887 (1969). The Sixth Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, guarantees a criminal defendant the right to trial by an impartial jury and statements or actions by the trial court that could influence the jurors violate this constitutional right and the due process right to a fair trial. *Cf. Parker v. Gladden*, 335 U.S. 363, 364-66 (1966).

Considering the facts in the instant case, I believe that the trial court's decision to replay the tapes could have resulted in the overemphasis of the probative value of the tapes or could have been construed by the jurors as an indication that the trial judge wanted them to return a verdict of guilty. It may have been proper, as the majority concludes, for the judge to have replayed the tapes in response to the jury's request, but here the trial court denied that request. After the jury had been deliberating for approximately twenty hours, he called them into court to ask if they were making progress. Then, despite the affirmative reply from the foreman, he played the tapes again for the jurors. This cannot be characterized as mere "delay" in responding to the jury's request to review this evidence because the trial judge had already expressly denied that request. In

these circumstances, playing the incriminating tapes even after the jury indicated that it was progressing to a verdict was prejudicial. This conclusion that the jurors were influenced is further supported by the fact that after hearing the tapes, they returned a guilty verdict within forty-five minutes. *See United States v. Harris*, 391 F.2d 348, 356 (6th Cir. 1968).

For the foregoing reasons, I would reverse the district court's denial of the writ on the petitioner's conviction for solicitation.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LARRY P. CRAMER,

Petitioner,

vs.

TYRONE C. FAHNER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the trial court acted within the bounds of its discretion in granting the jury's request to rehear the tapes during deliberations?

Whether the sufficiency of a state court indictment is reviewable by way of federal habeas corpus?

Whether petitioner was denied the right to confrontation even though he was in no way limited in his cross-examination of the State's witnesses?

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CONSTITUTIONAL PROVISIONS

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's state court convictions of three counts of conspiracy to commit murder and six counts of solicitation to commit murder were affirmed by the Appellate Court of Illinois, Fourth District. *People v. Cramer*, 64 Ill. App. 3d 688, 381 N.E.2d 827 (4th Dist. 1978). In ruling on petitioner's application for a writ of habeas corpus, the United States District Court for the Central District of Illinois granted the writ as to the conspiracy

convictions, but denied the writ as to the solicitation convictions. *Cramer v. Fahner*, Docket No. 79-2238 (C.D. Ill. 1980). Petitioner appealed, and respondent cross-appealed, to the United States Court of Appeals for the Seventh Circuit, which affirmed both actions of the district court in an opinion not yet published. *Cramer v. Fahner*, Docket Nos. 80-2545, 80-2757 (7th Cir. 1982). Copies of all three opinions are attached to the petitioner's brief as appendices.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254. However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENTS OF FACTS

The facts relevant to the issues raised by petitioner are adequately set forth in the opinions of the courts below, and need not be restated at length here. Respondent directs this Court's attention to the argument portion of this brief, where the facts pertaining to each claim of error are discussed.

There is, however, one glaring omission in petitioner's statement of facts concerning the procedural history of this case. Following his appeal to the Appellate Court of Illinois, and before his application for a writ of habeas corpus, petitioner filed a petition for writ of certiorari in this Court which was denied. *Cramer v. Illinois*, 444 U.S. 827 (1979). The first and third issues raised in the present petition are identical to the first and fourth issues raised in the former, and the second issue raised herein involves the same considerations as the second, third and fifth issues raised previously. Thus, the grounds raised herein for issuance of the writ have been recently considered by this Court.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT ACTED WITHIN THE BOUNDS OF ITS DISCRETION IN GRANTING THE JURY'S REQUEST TO REHEAR THE TAPES DURING DELIBERATIONS.

Three hours after the jury retired to deliberate, they sent a request to the trial court for an Illinois road map and a transcript of some tapes that were played during the trial. The tapes were of phone conversations between petitioner and the man he solicited to murder his wife. The request was denied because neither a road map nor a transcript of the tapes was in evidence. Some time later, the jury requested the tapes and a tape player. After consulting with counsel for both sides, the court denied the request because of the risk that the jury might damage the tapes, and because they had had sufficient exposure to the material on the tapes at trial. After twenty hours of deliberations, the court informed counsel that he would call the jury into the courtroom and ask if they were making progress, and if rehearing the tapes would help them. The jury informed the court that they were making progress, but they each said that rehearing the tapes would be helpful. The tapes were then replayed in open court. Forty-five minutes later, the jury returned with a guilty verdict.

Petitioner has never disputed that it was within the trial court's discretion to grant or deny the jury's request to rehear the tapes when that request was initially made. (Slip Opinion at 19) Indeed, it has been uniformly held that the trial court is invested with broad discretion in deciding whether to allow the replaying of tapes which have been admitted into evidence when requested

by the jury. *United States v. Zepeda-Santana*, 569 F.2d 1386 (5th Cir.), *cert. denied*, 437 U.S. 907 (1978); *United States v. Puchi*, 441 F.2d 697 (6th Cir.), *cert. denied*, 404 U.S. 853 (1971); *Hamilton v. United States*, 433 F.2d 526 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *People v. Pierce*, 56 Ill. 2d 361, 308 N.E.2d 577 (1974). The Seventh Circuit saw the question as whether the trial court, by delaying so long in granting the request, had lost its discretion to do so. (Slip Opinion at 21) Resolution of this turned, in the court's mind, on whether the delayed granting of the request created a substantial risk of coercing or confusing the jury. Relying on *United States v. DeStefano*, 476 F.2d 324 (7th Cir. 1973), and *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975), the court found that it did not. (Slip Opinion at 21-25)

Petitioner argues that the trial court, by its actions, singled out a particular piece of evidence as being, in its mind, the most probative, thereby intruding on the jury's function and coercing the guilty verdict that followed. As the court below correctly pointed out, this reading of the situation is not warranted by the record. It was the jury, not the trial court, that focused interest on the tapes, and twice requested to review them.

It is suggested by petitioner that the granting of certiorari in this case would give this Court an opportunity to provide guidance to both state and federal trial judges on the proper handling of judge-jury communications. Respondent submits that the court below fully considered and correctly decided the issue raised, and that the opinion is both scholarly and exhaustive. Moreover, this is a matter entrusted to the discretion of the trial court, requiring the exercise of sound judgment to the unique facts of each case. It is simply not a burning constitutional question warranting expenditure of this Court's finite resources. Accordingly, the petition should be denied.

II.

THE SUFFICIENCY OF A STATE COURT INDICTMENT IS NOT REVIEWABLE BY WAY OF FEDERAL HABEAS CORPUS.

Petitioner makes the claim that his conviction rests, at least in part, on proof of facts which were never presented to the grand jury and thus could not have formed the basis of his indictment. It does not appear that he questions whether that evidence should have been admitted at trial. Therefore, it must be presumed that it is the validity of the indictment which is challenged. This presumption is borne out by petitioner's assertion, at pages 17 and 18 of his brief, that the validity of a state court indictment may be challenged in federal habeas corpus proceedings where it is shown that the indictment is so defective as to deprive the court of jurisdiction; plainly does not charge a crime; or is so vague that it does not inform the defendant of what actions form the basis of the charge. At page 21 of his brief, petitioner settles on the last as the ground for his attack.

It is generally accepted that the validity of a state court indictment is not reviewable by way of federal habeas corpus. *Knewel v. Eagan*, 268 U.S. 442 (1925); *Branch v. Estelle*, 631 F.2d 1229 (5th Cir. 1980); *Henderson v. Cardwell*, 426 F.2d 152 (6th Cir. 1970); *United States ex rel. Mintzer v. Dros*, 403 F.2d 42 (2nd Cir. 1968); *United States ex rel. Budd v. Maroney*, 398 F.2d 807 (3rd Cir. 1968); *Johnson v. Beto*, 383 F.2d 197 (5th Cir. 1968). Petitioner's claim of vagueness seems to stem from his concern that it is impossible to tell whether the petit jury's verdict is based on the same evidence relied on by the grand jury to indict. (Pet. Br. at 20-22) However, this argument does not fall within the exception embraced by petitioner. He does not allege, for instance, that he was not sufficiently informed of the acts which

the State would rely on to prove the crime, or that a motion for a bill of particulars would not have remedied any lack of notice. Nor does he argue that he could not have been convicted under any set of facts provable under the indictment. Finally, he does not argue that the evidence which was presented to both the grand and petit juries could not have formed the basis for his conviction. In short, he offers no reason why the application of the general rule by the court of appeals was inappropriate here.

Both courts below correctly concluded that petitioner has failed to allege sufficient grounds for review of a state court indictment by way of federal habeas corpus proceedings. Therefore, the petition should be denied.

III.

SINCE THE TRIAL COURT IN NO WAY LIMITED PETITIONER'S CROSS-EXAMINATION OF PATTY COZAD, THERE WAS NO DENIAL OF THE RIGHT TO CONFRONTATION.

Petitioner alleges that the State concealed certain information concerning witness Patty Cozad which could have been used by the defense to impeach her, including the fact that she had been arrested on drug charges and that she had used her married name of Stafford when arrested. Despite the obvious similarity of these allegations to the facts of *Brady v. Maryland*, 373 U.S. 83 (1963), petitioner contends that it was his right to confrontation that was violated, citing *Davis v. Alaska*, 415 U.S. 308 (1974), *Smith v. Illinois*, 390 U.S. 129 (1968), and *Alford v. United States*, 282 U.S. 67 (1931). He does not allege that Ms. Cozad gave false testimony which would have been contradicted by the facts not disclosed, or that he was prevented by the trial court from exploring any areas on cross-examination. For this reason, re-

spondent argued below, and reasserts here, that *Davis*, *Smith*, and *Alford* are inapposite.

The court of appeals treated this claim as one implicating the *Brady* rule, even though petitioner argued in his brief (at page 33) that the facts did not give rise to a *Brady* violation, and went on to find the error harmless under *United States v. Agurs*, 427 U.S. 97 (1976). (Slip Opinion at pp. 9-11) Petitioner, in his petition for rehearing at page 1, referred to the court of appeals' *Brady-Agurs* analysis as "entirely reasonable," but persisted in his contention that his right to confrontation had been violated. Thus, it appears that petitioner's position is that his right to confrontation was violated by the State's failure to disclose information which he has consistently maintained was not required by *Brady* to be disclosed. This position is, to say the least, anomalous.

In his answer to the petition for rehearing, respondent argued that the court of appeals' analysis of this issue under *Brady* and *Agurs* was appropriate because no case was cited where a similar fact pattern was treated as creating a confrontation problem. Petitioner now replies to that argument by citing *United States ex rel. Annunziato v. Manson*, 425 F.Supp. 1272 (D. Conn.), *aff'd*, 566 F.2d 410 (2nd Cir. 1977), which he calls "[T]he only reported case petitioner could find involving this issue . . . where the district court held that a state habeas prisoner was denied the right to confrontation by the failure of the State to disclose exculpatory evidence concerning the bias of a key witness for the prosecution. . . ." (Pet. Br. at 25) Even a cursory reading of *Annunziato* reveals that the district court held nothing of the kind. In that case, the trial court refused to allow the defense to cross-examine prosecution witnesses concerning drug charges pending against them to show

their bias or motive to testify falsely, even though such evidence was admissible as a matter of state law. 425 F. Supp. at 1275. The court held that ". . . the right to cross-examine a witness to impeach his credibility or show motive or prejudice is fundamental to a fair trial . . . ," (*Id.* at 1275), and that "[T]he limits placed on the cross-examination of Bruce Pino were unjustified . . . and not harmless beyond a reasonable doubt." *Id.* at 1276. The court went on to find that "[T]he harmful effect of the denial of the right to cross-examination protected by the sixth amendment . . . was further exacerbated by the prosecution's failure to disclose that the witness, Pino, had actually been promised leniency and other extensive police aid in return for his testimony." *Id.* at 1277. The record disclosed that Pino actually lied about whether he had made a deal with the authorities. *Id.* at 1278. Thus, the district court's holding in *Annunziato* that the confrontation clause had been violated was based solely on the trial court's improper limitation of the scope of cross-examination. This alone is enough to distinguish *Annunziato* from the case at bar. Moreover, the fact that the State withheld exculpatory evidence from the defense was treated in *Annunziato*, appropriately, as a *Brady* violation. Therefore, *Annunziato* not only does not support petitioner's position, it actually supports respondent's.

The court below, employing the proper analysis, correctly concluded that petitioner is not entitled to relief. Petitioner's contention that a different analysis is required by the facts is groundless. Accordingly, the petition should be denied.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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